TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 519.

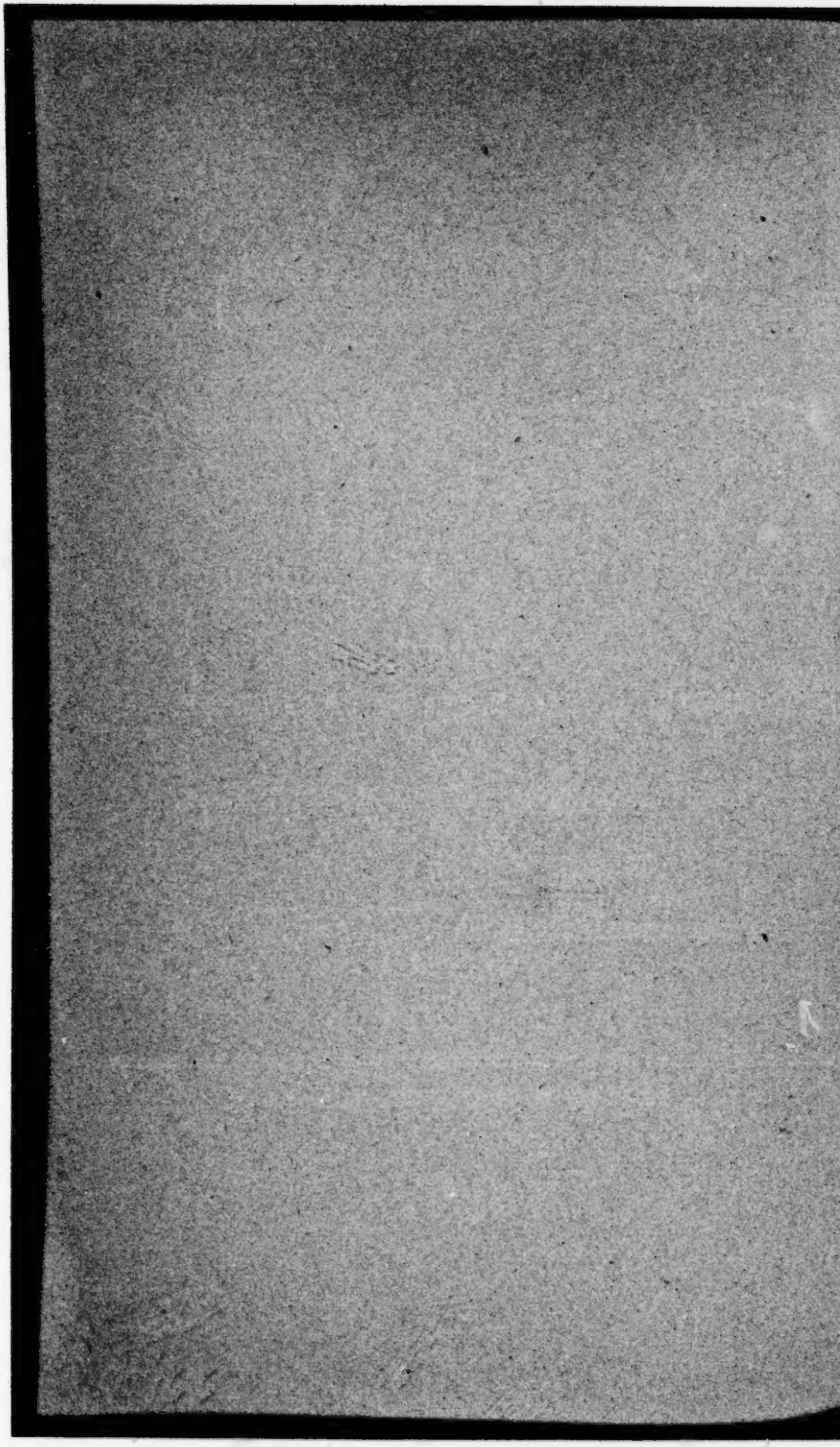
CHESTER S. JORDAN, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF MASSACHUSETTS.

IN ERROR TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

FILED FEBRUARY 23, 1911.



(22,541)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 6, 1912.

1 UNITED STATES OF AMERICA, *ss:*

[Seal of the Circuit Court, Massachusetts.]

The President of the United States to the Honorable the Judges of the Superior Court of the Commonwealth of Massachusetts, holden at Cambridge, within and for the County of Middlesex, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Superior Court before you, or some of you, being the highest court of law or equity of the State of Massachusetts in which a decision could be had in the suit between Commonwealth of Massachusetts, Plaintiff, and Chester S. Jordan, Defendant, in a plea of not guilty, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Chester S. Jordan, as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward D. White, Chief Justice of the United States, the twenty-eighth day of January, in the year of our Lord one thousand nine hundred and eleven.

CHARLES K. DARLING,
Clerk of the Circuit Court of the United States,
District of Massachusetts.

Allowed by—

JOHN A. AIKEN,
Chief Justice of the Superior Court.

2 COMMONWEALTH OF MASSACHUSETTS,
Middlesex, ss:

And now, here, the Judges of the Superior Court make return of this writ by annexing hereto and sending herewith, under the seal of the said Superior Court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In Testimony Whereof, I, William C. Dillingham, Assistant Clerk of said Superior Court, have hereto set my hand and the seal of said Court this twenty-first day of February, A. D. 1911.

[Seal the Superior Court.]

WM. C. DILLINGHAM,
Ass't Clerk.

3 [*Bond on Writ of Error.*]

Know all Men by these Presents, That we, Chester S. Jordan and Fred C. Kendall, both of Somerville, in the County of Middlesex and Commonwealth of Massachusetts, are held and firmly bound unto Commonwealth of Massachusetts in the full and just sum of one thousand dollars, to be paid to the said Commonwealth of Massachusetts; to which payment well and truly to be made we bind ourselves, our Heirs, Executors, and Administrators, jointly and severally, by these Presents.

Sealed with our seals, and dated the twenty-eighth day of January, in the year of our Lord one thousand nine hundred and eleven.

Whereas lately at a hearing before the Superior Court of the Commonwealth of Massachusetts, holden for the transaction of criminal business, at Cambridge, within and for the County of Middlesex, in a suit depending in said Court between the Commonwealth of Massachusetts and Chester S. Jordan, judgment was rendered against the said Chester S. Jordan and the said Chester S. Jordan having procured a writ of error and filed a copy thereof in the clerk's office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Commonwealth of Massachusetts citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington on the twenty-fifth day of February next:

Now the condition of the above obligation is such, that if the said Chester S. Jordan shall prosecute his said writ of error to effect, and answer all damages and costs, if he fail to make his plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

CHESTER S. JORDAN. [L. S.]
FRED C. KENDALL. [L. S.]

Signed, sealed and delivered in presence of—
GEORGE J. NICHOLSON, To Both.

Approved:
JOHN A. AIKEN,
Chief Justice of the Superior Court.

The foregoing is a true copy.
Attest:

WM. C. DILLINGHAM,
Ass't Clerk.

4 *Citation on Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Commonwealth of Massachusetts, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden at Washington, on the* twenty-fifth day of February next, pursuant to a Writ of Error filed in the Clerk's Office of the† Superior Court of the Commonwealth of Massachusetts holden for the transaction of criminal business within and for the County of Middlesex wherein Chester S. Jordan is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable John A. Aiken, Chief Justice of the Superior Court of the Commonwealth of Massachusetts, this twenty-eighth day of January, in the year of our Lord one thousand nine hundred and eleven.

[Seal the Superior Court.]

JOHN A. AIKEN,
Chief Justice of the Superior Court.

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*Not exceeding 30 days from the day of signing.
†Name of Court to which Writ of Error is directed.

5 BOSTON, MASS., *Feb.* 1, 1911.

Due and sufficient service of the within citation is hereby accepted for the Commonwealth of Massachusetts.

JAMES M. SWIFT,
Attorney General.

6 COMMONWEALTH OF MASSACHUSETTS,
Middlesex, ss:

I, William C. Dillingham, Assistant Clerk of the Superior Court within and for the County of Middlesex, in said Commonwealth, do certify that John A. Aiken, Esquire, whose proper certificate is hereunto annexed, is the Chief Justice of the said Superior Court.

In testimony whereof, I hereunto set my hand and affix the seal of said Superior Court, this twenty-first day of February, in the year of our Lord one thousand nine hundred and eleven.

[Seal the Superior Court.]

WM. C. DILLINGHAM,
Ass't Clerk.

7 COMMONWEALTH OF MASSACHUSETTS:

I, John A. Aiken, Chief Justice of the Superior Court of the Commonwealth of Massachusetts, do certify that William C. Dillingham, Esquire, whose signature is affixed to the papers hereunto annexed, is Assistant Clerk of said Superior Court for the County of Middlesex, and hath the keeping of the files, records and proceedings of said Court within and for said County; also of the late Court of Common Pleas within and for said County in the absence of the Clerk; that he is, by law, the proper person to make out and certify copies of the files, records and proceedings of said several Courts in the absence of the Clerk and said Clerk is now absent; that full faith and credit are and ought to be given to his acts and attestations done as aforesaid; and that his attestation to the papers hereunto annexed, of the files, records and proceedings of the said Superior Court is in due form.

In testimony whereof, I have set my hand, and caused the seal of said Court to be hereunto affixed, this twenty-first day of February, in the year of our Lord one thousand nine hundred and —.

[Seal the Superior Court.]

JOHN A. AIKEN,
Chief Justice of the Superior Court.

8 COMMONWEALTH OF MASSACHUSETTS,
Middlesex, ss:

To all Persons to whom these Presents shall come, Greeting:

Know Ye, that among our records of our Superior Court within and for the County of Middlesex, Anno Domini, 1911,

It is thus contained, to wit:

9 COMMONWEALTH OF MASSACHUSETTS,
Middlesex, ss:

Superior Court.

COMMONWEALTH, by Indictment,
vs.
CHESTER S. JORDAN.

To the Honorable the Justices of the Superior Court:

And now comes Chester S. Jordan and complains in the records and proceedings, and also in the rendition of judgment in the plea between the Commonwealth of Massachusetts and himself tried in the said Superior Court within and for the County of Middlesex on the twelfth day of April, 1909, in which judgment was rendered on the sixth day of January 1911, manifest error hath intervened to the great damage of the said defendant, wherefore he prays for the allowance of a writ of error and for such further processes as may

cause the same to be corrected by the Supreme Court of the United States.

By His Attorneys, CHESTER S. JORDAN,
CHARLES W. BARTLETT,
HARVEY H. PRATT,
JEREMIAH S. SULLIVAN,
ARTHUR THAD SMITH.

10 *Assignment of Errors.*

And thereafterwards, appeared the said defendant, and for errors in the proceedings in the Superior Court of the Commonwealth of Massachusetts, sitting within and for the County of Middlesex, in the plea and judgment thereon between said Commonwealth of Massachusetts and the said Chester S. Jordan and the several findings and rulings of said Court, therein assigns as follows:

1. Said Superior Court erred in refusing to rule upon all the evidence, as a matter of law, that the petitioner hereinafter called the defendant and prisoner, was entitled to a new trial.

2. Said Superior Court erred in refusing to rule as requested by the defendant, that it is not incumbent as a matter of law upon the defendant to satisfy the court by a fair preponderance of the evidence or beyond a reasonable doubt that the juror White was not of sufficient mental capacity during the late trial of the Commonwealth against the defendant in order to entitle the defendant to a new trial, but if the evidence creates a reasonable doubt in the mind of the court as to whether the juror White was at any time during the introduction of evidence or the deliberations of the jury at the trial of the Commonwealth against the defendant of not sufficient mental capacity to enable him to perform his duties intelligently, then as a matter of law, the defendant is entitled to a new trial.

3. Said Superior Court erred in refusing to rule that it is not incumbent as a matter of law upon the defendant to satisfy the court by a fair preponderance of the evidence or beyond a reasonable doubt that the juror White was not of sufficient mental capacity
11 during the late trial of the Commonwealth against the defendant in order to entitle the defendant to a new trial, but if the evidence creates a reasonable doubt in the mind of the court as to whether the juror White was throughout the entire trial of the Commonwealth against the defendant of not sufficient mental capacity to enable him to perform his duties intelligently, then as a matter of law, the defendant is entitled to a new trial.

4. Said Superior Court erred in refusing to rule that when the question of the insanity or lack of mental capacity of a juror during the trial of a capital case is raised by the defendant by sufficient evidence at a hearing on a motion for a new trial for that cause, the defendant is entitled as a matter of law to a new trial, unless the Commonwealth establishes beyond a reasonable doubt the sanity or mental capacity during the trial.

5. Said Superior Court erred in refusing to rule that when in a hearing on a motion for a new trial because of the alleged insanity

or lack of mental capacity of a juror during the trial in a capital case there is a conflict of evidence as to whether the juror was on the one hand sane or of sufficient mental capacity to perform his duties intelligently during the entire trial, or on the other hand insane or of not sufficient mental capacity to enable him to perform his duties intelligently either during the whole or any part of the trial, as a matter of law, the burden of proof is upon the Commonwealth to establish beyond a reasonable doubt that the juror was sane or of sufficient mental capacity to enable him to perform his duties intelligently during the entire trial, including the investigation of the cause in court and the deliberations of the jury upon their verdict up to and including the time of the rendering of said
12 verdict, and if the Commonwealth does not sustain this burden of proof, the defendant as a matter of law is entitled to a new trial.

6. Said Superior Court erred in refusing the rule that if a juror in a capital case at any time during the introduction of evidence or the deliberations of the jury incapacitated by mental disease for the just performance of his duties and his incompetency is not known to the parties or the court before or during the trial, a new trial must as a matter of law be granted to the defendant upon his motion for a new trial on said ground, as he has been deprived of his rights under Article XII of Part the First of the Constitution of the Commonwealth of Massachusetts and Article XIV of the Amendments to the Constitution of the United States.

7. Said Superior Court erred in refusing to find as a fact that upon all the evidence in the case the juror White by a fair preponderance of the evidence was incapacitated by mental disease for the just performance of his duties during the entire trial of the Commonwealth against the defendant.

8. Said Superior Court erred in refusing to rule as requested by the defendant that if the Court finds as a fact that upon all the evidence in the case juror White by a fair preponderance of the evidence was incapacitated by mental disease for the just performance of his duties during the entire trial of the Commonwealth against the defendant then as a matter of law the defendant is entitled to a new trial, as he has been deprived of his rights under Article XII of Part the First of the Constitution of the Commonwealth of Massachusetts and Article XIV of the Amendments to the Constitution of the United States.

13 9. Said Superior Court erred in refusing to find as a fact that upon all the evidence, by a fair preponderance of the evidence, the juror White was incapacitated by mental disease for the just performance of his duties during the deliberations of the jury upon their verdict at the trial of the Commonwealth against the defendant.

10. Said Superior Court erred in refusing to rule as requested by the defendant that if the Court finds as a fact upon all the evidence, by a fair preponderance of the evidence that juror White was incapacitated by mental disease for the just performance of his duties during the deliberations of the jury on their verdict upon

the trial of the Commonwealth against the defendant, then as a matter of law, the defendant is entitled to a new trial as he has been deprived of his rights under Article XII of Part the First of the Constitution of the Commonwealth of Massachusetts and Article XIV of the Amendments to the Constitution of the United States.

11. Said Superior Court erred in refusing to find as a fact upon all the evidence in the case by a fair preponderance of the evidence the juror White was incapacitated by mental disease for the just performance of his duties at the time that the verdict was rendered by the jury at the trial of the Commonwealth against the defendant.

12. Said Superior Court erred in refusing to rule as requested by the defendant that if the Court finds as a fact upon all the evidence in the case, by a fair preponderance of the evidence, the juror White was incapacitated by mental disease for the just performance of his duties at the time that the verdict was rendered by the jury at the trial of the Commonwealth against the defendant, then as a matter of law the defendant is entitled to a new trial as he has been deprived of his rights under Article XII of Part the First
14 of the Constitution of the Commonwealth of Massachusetts and Article XIV of the Amendments to the Constitution of the United States.

13. Said Superior Court erred in refusing to find as a fact that upon all the evidence, by a fair preponderance of the evidence, the juror White was incapacitated by mental disease for the just performance of his duties during a part of the time that evidence was being introduced, the arguments were being made and the charge of the court was being given in the trial of the Commonwealth against the defendant.

14. Said Superior Court erred in refusing to rule as requested by the defendant that if the Court finds as a fact upon all the evidence, by a fair preponderance of the evidence, the juror White was incapacitated by mental disease for the just performance of his duties during a part of the time that evidence was being introduced, the arguments were being made and the charge of the Court were being given in the trial of the Commonwealth against the defendant then as a matter of law the defendant is entitled to a new trial as he has been deprived of his rights under Article XII of Part the First of the Constitution of the Commonwealth of Massachusetts and Article XIV of the Amendments to the Constitution of the United States.

15. Said Superior Court erred in refusing to rule that if the Court finds that the defendant is otherwise entitled to a new trial, it is immaterial as a matter of law in a capital case whether the verdict rendered was proper or improper, as the defendant is prejudiced by the mere sitting upon the jury of a man mentally incapable of the just performance of his duties.

16. Said Superior Court erred in refusing to rule as requested by the defendant that if the Court finds as a fact that upon all the evidence in the case there is reasonable doubt whether the juror White was incapacitated by mental disease for the just performance of his duties during the entire trial of the Commonwealth against the

defendant then as a matter of law the defendant is entitled to a new trial as he has been deprived of his rights under Article XII of Part the first of the Constitution of the Commonwealth of
15 Massachusetts and Article XIV of the Amendments to the Constitution of the United States.

17. Said Superior Court erred in refusing to rule as requested by the defendant that if the court finds upon all the evidence there is a reasonable doubt whether the juror White was incapacitated by mental disease for the just performance of his duties during the deliberations of the jury upon their verdict at the trial of the Commonwealth against the defendant, then as a matter of law the defendant is entitled to a new trial as he has been deprived of his rights under Article XII of Part the First of the Constitution of the Commonwealth of Massachusetts and Article XIV of the Amendments to the Constitution of the United States.

18. Said Superior Court erred in refusing to rule as requested by the defendant that if the court finds upon all the evidence there is a reasonable doubt as to whether the juror White was incapacitated by mental disease for the just performance of his duties during a part of the deliberations of the jury upon their verdict, then as a matter of law the defendant is entitled to a new trial as he has been deprived of his rights under Article XII of Part the First of the Constitution of the Commonwealth of Massachusetts and Article XIV of the Amendments to the Constitution of the United States.

19. Said Superior Court erred in refusing to rule as requested by the defendant that if the court finds upon all the evidence in the case there is a reasonable doubt whether the juror White was incapacitated by mental disease for the just performance of his duties at the time that the verdict was rendered by the jury at the trial of the Commonwealth against the defendant, then as a matter
16 of law the defendant is entitled to a new trial as he has been deprived of his rights under Article XII of Part the First of the Constitution of the Commonwealth of Massachusetts and Article XIV of the Amendments to the Constitution of the United States.

20. Said Superior Court erred in refusing to rule as requested by the defendant that if the court finds upon all the evidence there is a reasonable doubt whether the juror White was incapacitated by mental disease for the just performance of his duties during a part of the time that evidence was being introduced, the arguments were being made and the charge of the court was being given at the trial of the Commonwealth against the defendant, then as a matter of law the defendant is entitled to a new trial as he has been deprived of his rights under Article XII of Part the First of the Constitution of the Commonwealth of Massachusetts and Article XIV of the Amendments to the Constitution of the United States.

21. Said Superior Court erred in refusing to rule as requested by the defendant that if the court finds upon all the evidence in the case it is not proved beyond a reasonable doubt that the juror White was mentally capable of justly performing his duties during the entire trial of the Commonwealth against the defendant, then as a matter of law the defendant is entitled to a new trial as he has been de-

prived of his rights under Article XII of Part the First of the Constitution of the Commonwealth of Massachusetts and Article XIV of the Amendments to the Constitution of the United States.

22. Said Superior Court erred in refusing to rule as requested by the defendant that if the court finds as a fact upon all the
17 evidence that it is not proved beyond a reasonable doubt that the juror White was mentally capable of justly performing his duties during the deliberations of the jury upon their verdict at the trial of the Commonwealth against the defendant, then as a matter of law the defendant is entitled to a new trial as he has been deprived of his rights under Article XII of Part the First of the Constitution of the Commonwealth of Massachusetts and Article XIV of the Amendments to the Constitution of the United States.

23. Said Superior Court erred in refusing to rule as requested by the defendant that if the court finds upon all the evidence in the case it is not proved beyond a reasonable doubt that the juror White was mentally capable of justly performing his duties at the time the verdict was rendered by the jury at the trial of the Commonwealth against the defendant, then as a matter of law the defendant is entitled to a new trial as he has been deprived of his rights under Article XII of Part the First of the Constitution of the Commonwealth of Massachusetts and Article XIV of the Amendments to the Constitution of the United States.

24. Said Superior Court erred in refusing to rule as requested by the defendant that if the court finds upon all the evidence it is not proved beyond a reasonable doubt that the juror White was mentally capable of justly performing his duties during a part of the time that evidence was being introduced, the arguments were being made and the charge of the court was being given at the trial of the Commonwealth against the defendant, then as a matter of law the defendant is entitled to a new trial as he has been deprived of his rights under Article XII of Part the First of the Constitution of the Commonwealth of Massachusetts and Article XIV of the Amendments to the Constitution of the United States.
18

25. Said Superior Court erred in refusing to rule as requested by the defendant that having been furnished a list of qualified jurors, the law places the responsibility on the court of seeing to it that only such persons as are qualified shall sit. The prisoner may only interpose his objection by way of challenge, the number being fixed by statute. The fact that a juror otherwise qualified, is mentally disqualified being brought to the attention of the court, it is the latter's duty to see that he is not placed upon the panel. If he is allowed to sit on the jury and during some part of the time he is so sitting he becomes mentally disqualified, it is the duty of the court to undo the work in which the juror participated and to declare it a mistrial.

26. Said Superior Court erred in finding by a fair preponderance of all the evidence as a fact that juror Willis A. White was of sufficient mental capacity during the entire trial of Chester S. Jordan, until after the verdict was returned, to intelligently consider the

evidence, appreciate the argument of counsel, the rulings of law, the charge of the court and to arrive at a rational conclusion.

27. Said Superior Court erred in overruling the motion for a new trial in that upon all the evidence taken at the hearing upon the motion for a new trial the defendant was entitled to a new trial as a matter of law.

28. Said Superior Court erred in overruling the motion for a new trial if the same was done as a matter of law in that the findings made by the court does not disclose any adequate grounds in law for refusing to grant a new trial to the defendant, and the court, by
19 refusing to grant a new trial upon the grounds set forth in its finding has deprived him of the rights guaranteed to him under Article XII of Part the First of the Constitution of the Commonwealth of Massachusetts and Article XIV of the Amendments to the Constitution of the United States.

29. Said Superior Court erred in overruling the motion for a new trial in that the finding made by the court does not disclose any adequate grounds in law for refusing a new trial to the defendant, and the court, by refusing to grant him a new trial upon the grounds set forth in its finding has deprived him of the rights guaranteed to him under Article XII of Part the First of the Constitution of the Commonwealth of Massachusetts and Article XIV of the Amendments to the Constitution of the United States.

CHESTER S. JORDAN,
By His Attorneys, CHARLES W. BARTLETT,
HARVEY H. PRATT,
JEREMIAH S. SULLIVAN,
ARTHUR THAD SMITH.

Filed January 31, 1911.

28–33 COMMONWEALTH OF MASSACHUSETTS.
Middlesex, To wit:

At the Superior Court, Begun and Holden at Lowell within and for the County of Middlesex, on the first Monday of March in the year of our Lord One Thousand Nine Hundred and Nine.

The Jurors for the Commonwealth of Massachusetts on their oath present, that Chester S. Jordan on the first day of September in the year of our Lord one thousand nine hundred and eight at Somerville, in the County of Middlesex aforesaid, did assault and beat Honora C. Jordan with intent to murder her, and by such assault and beating, did kill and murder the said Honora C. Jordan.

Against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

A true bill.

JOHN HURLEY,
Foreman of the Grand Jury.

JOHN J. HIGGINS,
District Attorney.

The foregoing indictment was found by the Grand Jury and entered in this Court on the fifth day of April, A. D. 1909.

* * * * * * *

34 & 35 COMMONWEALTH OF MASSACHUSETTS,
Middlesex, ss:

Superior Court.

COMMONWEALTH by Indictment,
vs.
CHESTER S. JORDAN.

On the fifteenth day of April, A. D. 1909, said Chester S. Jordan, being in Court under the custody of the Sheriff of said County, was arraigned at the bar in his own proper person, and the said indictment being read to him, and he being forthwith demanded concerning the premises to the said indictment above specified and charged upon him, said that thereof he was not guilty, and he was thereupon ordered to be committed into the custody of the Sheriff of said County without bail or mainprise.

36 COMMONWEALTH OF MASSACHUSETTS,
Middlesex, ss:

Superior Court.

COMMONWEALTH, by Indictment,
vs.
CHESTER S. JORDAN.

On the twentieth day of April, A. D. 1909, again came the said Chester S. Jordan, under the custody of the Sheriff, before the Court, and for trial of said indictment put himself upon the country. A jury was thereupon empanelled and sworn to try the issue, viz.:—Newell H. Felton, foreman, appointed by the Court, and fellows, to wit: Willis A. White, Perry B. Howard, Timothy F. Sheehan, George R. Vaughn, Thomas Smallwood, Otter T. Bryn, John Cullen, Thomas F. Stafford, Charles R. Hurley, Jerry T. Morrill and James Culhane, who, being sworn to speak the truth concerning the premises, did, on the fourth day of May, in the year of our Lord one thousand nine hundred and nine upon their oaths say that said Chester S. Jordan is guilty of murder in the first degree.

37 & 38 COMMONWEALTH OF MASSACHUSETTS,
Middlesex, ss:

Superior Court, March Sitting, 1909.

COMMONWEALTH, by Indictment,
vs.
CHESTER S. JORDAN.

Defendant's Bill of Exceptions, Embracing Questions Raised at the Trial and Prior Thereto.

* * * * * * *

39-213 Seventeen jurors were peremptorily challenged by the defendant.

* * * * * * *

214 COMMONWEALTH OF MASSACHUSETTS,
Middlesex, ss:

Superior Court, March Sitting, 1909.

COMMONWEALTH, by Indictment,
vs.
CHESTER S. JORDAN.

Defendant's Bill of Exceptions, Embracing Questions Raised on the Motion for a New Trial.

This is an indictment for murder. On the fourth day of May, 1909, in the Superior Court before Stevens and Bell, JJ., there was a verdict of guilty. On the eighth day of the same May, Willis A. White, one of the jurors who was sworn in the case, acted upon the panel and agreed to the verdict of guilty rendered against the defendant, was committed to the Bloomingdale Asylum for the insane at Worcester, as an insane person.

On the tenth day of the same May the defendant filed a motion for a new trial based upon the insanity of Juror White, a copy whereof with affidavits is hereto annexed, marked "A," and made a part of this bill of exceptions. Hearings upon the motion were had orally before the judges on the twenty-fifth day of September, and the second, ninth and sixteenth days of October, A. D. 1909. Frank H. Burt, Esq., was sworn as a commissioner to take the evidence.

The following is all the material evidence received and heard by the court upon the motion:—

215 A certified copy of the record of commitment of Willis A. White, dated the eighth day of May, 1909, together with affidavits of Drs. Frank U. Rich and George E. Titcomb, physicians who testified at the proceedings with reference to his commitment, were read and admitted in evidence.

Willis A. White at the age of 55, or thereabouts, was sworn as a

juror in Commonwealth v. Chester S. Jordan. Oscar R. White, brother of Willis, was committed to the Insane Hospital at Augusta, Me., November 10, 1883, and was released June 14, 1886, his condition being "very much improved." The record which was kept at that institution in accordance with law referring to Oscar R. White, reads in part as follows: "Insanity is hereditary on his father's side." Both his grandfather Peletiah and his uncle Daniel committed suicide. Subsequently in July, 1901, Oscar R. White was committed to the Insane Hospital at Bangor, Me., and died there some time later.

ARTHUR A. DAKIN testified that he had known Willis A. White for twelve or fifteen years; that he had done business with him, and had had an opportunity to observe his manner of speech and conduct. He testified that Mr. White would sometimes holler in a loud voice at most everybody he met on the street and acted as if he wanted they should all know he was around; that when he talked he was accustomed to use his arms in gesticulation; that this was more noticeable of late years than during the earlier periods of his acquaintance; that during the five years previous to his serving on the Jordan jury he had been in several different kinds of business, and shifted from one to the other; that he was a man who drove horses considerably; that witness considered him a reckless driver, and on different occasions witness knew of Mr. White's breaking portions of his wagons, and that White acted as though he was pleased when he was smashing things up; that in his conversation he was in the habit of shifting from one subject to another; that he was a very excitable man; that on Tuesday, May 4th, the day of the Jordan verdict, witness met Juror White between 7 and
216 8 p. m. on the road near the town of Maynard; witness asked White about verdict; he said his tongue was sealed, he couldn't say anything about it; that White told witness during the Jordan trial he was treated badly, that he did not get enough to eat, and he thought his food had been tampered with, and there was some of it he would not eat; that after the verdict White had gone out to Cambridge to bid Jordan good-bye, but they would not let him into the jail; and that White in going from Boston to his home in Maynard had taken a train to South Acton and was walking home at the time witness met him, although if White had taken a train to Maynard he would have been two miles nearer home.

Witness further testified that on Friday, May 7th, 1909, after the verdict he met White at the house of Sylvester D. Perry and that White there charged witness with having been sent out by reporters on Tuesday night previous to pump him about the trial, and that after witness explained that such was not the fact, White asked for forgiveness, put his arms around the neck of witness and kissed him.

On cross-examination witness testified that he lived about two and one-half miles from White; went to the White home occasionally; did not think he had been to the house during the last year; might have been at the White house a dozen times in the last two years;

knew nothing about White's private business; it was not unusual for a man to break up a wagon when he was driving a green horse.

ROLAND P. HARRIMAN testified that he had known Mr. White for twenty-five years; that in May, at the time of the trial of Commonwealth v. Jordan, the witness was serving as a juror in the Supreme Judicial Court, which court held a sitting at East Cambridge at that time; that on Wednesday morning, the fifth day of May, at about ten minutes past eight, the witness met White on his way to the railroad station. As the witness addressed him White turned, grasped him by his right hand, and put his other on his, White's,
heart and said, "Mr. Harriman, it is terrible, that man was
217 just as innocent as you, but we had to bring in a verdict."
At first he appeared surly, and later became excited. Spoke to him in a very earnest tone. I thought he looked first rate; he was all shaved up fine, hair cut, and dressed up nicely.

Q. And during that time, and especially within the last three to five years, what have you noticed in his speech, conduct, conversation or manner, that differed in any essential particular from that of the ordinary rational individual?

A. I don't know that I had noticed anything particular, except I considered him a——

Q. Not what you considered him. Say what you have seen him do, how you have seen him act, what you have heard him say.

Witness then went on to testify that he was noisy in greeting friends; was always good-natured; I should say he was nervous; haven't seen that same manner indicated to person whom he didn't know.

The witness boarded the train and was sitting with a friend when White came and beckoned to him and asked him to come down farther in the car and sit with him. This he did. As they were sitting together White told the witness that he had been drugged down at the trial and they had put stuff in his food, and he thought they had put it in his tea, and so he stopped taking the tea. The effect kept on just the same and that he was obliged to get up twelve times in the night. After that White declared he would not eat what had been brought to him, but demanded other food. He said they would bring him steak and he would push it away and say he wanted eggs and make them give him a half dozen oranges in the bag when he went out. He said this tampering with his food was done to take away his mind so he had to decide the way it was decided by his fellows. The ride to Boston consumed nearly an hour, during which White took a lot of papers from his pocket and sorted them out, took out letters to show the witness, which letters he
(White) had written to his wife. He found some difficulty
218 in deciphering them and followed them along with his finger
on the line, and talked confidentially all the way so that no one could hear except the witness. In one of the letters White was describing a trolley trip that he made on a Sunday during the trial. He described the whole trip to his wife and told her every town he went through, towns that were not far from home. He told her about

not being allowed to bow to people whom he met; that one instance he saw some one whom he knew and whom he had not seen for years and bowed to them and "they called me down" for it. White remarked that it was terrible to be treated that way. This occasion he recalled White told him was the Sunday previous to the verdict. He had three of these letters among a pocketful of papers. When White and the witness got out of the train, the latter informed the former that he was going over to the court house in East Cambridge. White immediately said he was going in town and was going right back home on the next train. On the evening of the same day the witness again met White standing in the middle of the road in Maynard with both hands up. He stopped the witness and said, "I am all clear now, Harriman, I was a little cloudy this morning. I was just going up to your house." He tried to get into the witness's automobile and said, "Well, I don't know as you have got room for me. It makes no difference, but after supper come down to the house." Upon cross-examination witness testified that he arrived in Boston at 9 or 9.10; next train from Boston to Maynard went at 11.30; I never went to his house; never met his family; simply met him on the street; probably three or four years ago I bought a horse of him; last fall I bought trees of him; at that time didn't observe anything different from what I had known of him in previous years; so far as I know he was a pretty good horse trader, shrewd and keen in the horse trade; up to the time of my talk with him on Wednesday I had never given the matter of his mental condition any thought; up to that time there had been nothing to call it to my attention. The witness testified that he
219 had known that White drove a team which carried school children to school in Maynard for a number of years.

Abraham E. Ray testified that for three years before the trial he had lived in the same house with Mr. White, which belonged to the latter; that White was quick to get mad and just as quick to get over it; that he had the blues and at other times would be "happy enough and singing"; that he was continually "hollering hello to most everybody," whether he knew them or not it would make no difference. During the three years of his acquaintance with White he had been in at least nine different kinds of business, and was prone to go rapidly from one thing to another; that the week before White left to attend to his duties as a juryman he volunteered to put a harness in soak for the witness, to wash it and oil it; he put it in soak in a tub of water and then went off and was gone four or five days. When the witness himself saw it and poured the water off the harness was spoiled; that he borrowed the witness's tools and broke them up; was a good hand to break up tools; couldn't say that at that time he had a set of double harness; he generally had a set of double harness; the wagon that he had anyway was nothing but shafts; he couldn't use a double harness if he had one; that although he had a set of double harness he would drive his horses tandem and ride one, the shaft horse; that he was pretty rough with his horses and cattle, hitting them with a shovel if he happened to have a shovel

in his hand, or stick, or anything. The witness testified that he saw him on Thursday after the verdict. He put his arm around the witness and said that the mist had rolled away and everything would be all right in a little while. He seemed excited. From what he said I thought he had experienced religion while he was on the Jordan jury.

On cross-examination, witness testified that he knew nothing about White's business; he never told me anything about his business troubles; up to the time of this trial had never noticed anything in his conduct or behaviour that let me to think he was insane.

220 SYLVESTER D. PERRY testified that he was a farmer; that he had known Willis A. White for fifteen years, and during that period had done considerable business with Mr. White; that Mr. White had been in several different kinds of business and that he would change from one thing to another—one day he would be perhaps peddling fish, and in a week he would be running a meat wagon; that he was not successful as a business man; that he shouted "Hello" to almost everybody he met driving on the road; used to ride together quite a good deal; that when driving on the road with witness he would frequently fall asleep and remain in that condition for a short time; that he was noisy and loud spoken; that when he officiated as auctioneer he showed evidence of a bad memory, and frequently did not remember the amount of the bid that had been made.

On Friday after the verdict White came to witness's house, shook hands with him, put his arms around his neck and kissed him. At this time the lower part of White's face was white as could be, and the upper part was almost crimson. He asked for a glass of whiskey with egg in it. Witness did not have any whiskey but served rum instead. White said it was not strong enough, and asked for more, and it was given to him. Witness testified that during the years he had known Mr. White he was not a drinking man. White then asked for some dinner, and while eating his conduct attracted the attention of everyone at the table. When he had partially eaten his dinner he asked to lay down and after he had been lying down for a few minutes he came back to the kitchen and said to witness that "he was all right. Everything was clear to him." He then sat at the table and ate some more. He got up and returned to the table several times while the others were eating. After he finally stopped eating he lay on the sofa, and asked the witness to come over near him. He put his arms around witness's neck and drew him down near the sofa and held him for quite a few minutes. Witness then harnessed his horse and drove Mr. White home. On the way
221 White talked a good deal and sung religious songs, and occasionally would fall asleep. When they arrived at Mr. White's home, Mr. White said to witness that everything was clear to him then. Witness was about to leave when Mr. White said he had an errand for him to do. He took a package of envelopes out of his desk and wrote on the back of several of them, and finally

handed witness two, with instrutions to deliver them to Mr. Bartlett and Mr. Sullivan. These read as follows:—

1.

Please telephone to General Bartlett and Sullivan, who was on the Jordan case to come up here and get me tomorrow, for I want to see them and them only so I will rest easy and work here on the farm until they come.

WILLIS A. WHITE,
Maynard, Mass.

2.

They will know me for I pointed looked at Mr. Sullivan and pointed to myself the first days of the trial. Am sorry I put all the court officers to so much bother and sorrow but it will be all right.

WILLIS A. WHITE,
Maynard, Mass.

On cross-examination witness testified that White was a pretty good horse trader, a good judge of horses; he was a hustler; that a week or ten days before the trial, White told witness that he had been drawn on the jury; that he wasn't doing anything and thought he would like to get on the jury for the money; that he could do it as well as not; witness told White he was too old and too nervous a man to go on a jury, especially a murder case; that he didn't tell White that he, White, was of unsound mind; that it didn't occur to the witness at that time; it had occurred to witness before
222 the trial that White was a very peculiar kind of a man; he wouldn't call White a crazy man; he didn't think it was insane for White to go through the village and holler to Tom, Dick and Harry; it had never occurred to the witness that those things were any evidence of insanity; that up to the time of the trial, had never seen anything that led him to think that White was mentally unsound, and never could call White before the trial a crazy man or unsound mentally; White was a first-class man to break a green horse; one of the best the witness ever saw.

ARTHUR E. WALKER, a selectman of the town of Maynard, testified that he had known White 20 years; on Friday following the verdict he met Mr. White about eight o'clock in the village of Maynard, and later at his farm, in the same town at about ten o'clock. Here the two had conversation. The witness asked White if he was not glad to get off from the court room and get back home, and he said he was. White leaned up against the wall and said "I ain't feeling well; I want you should take me in to the barn, I must have a chair and sit down." I got a chair for him and he said, "they think down to the court room that I was crazy. Now, I have got some letters to read to you to show I was not crazy, and I want your judgment on it." He fumbled around among a pocketful of papers and read some of it. Meantime he called for water twice and wanted to know if I had some whiskey, but I told him I had not and got

him some water. He read these letters to me. Part of one I remember had reference to a trolley ride that White took here in Boston, which he said was the most beautiful trip he ever took in his life, describing the towns surrounding here, which I had assumed he often had seen before, and saw no occasion for him to dwell so on the beauties of that ride. He seemed to be mixed up in reading of the letter. He would read part of one page and say that was not where he wanted, and he wanted another page, and he would hunt around these papers and read a part of another letter, and then skip around from one thing to another. He didn't read the letter connectedly or intelligently. He spoke of food which had been
223 served him during his term of service on the jury as not being sufficient, said that it had been tampered with and "Mr. Jordan is just as innocent as you and I. They put something in my food, my tea and also in the beefsteak to make me think as they wanted I should." He said he refused to drink it finally, and also refused to eat any steak but instead ordered eggs. He was excited and threw his arms around a good deal and seemed to be in a highly nervous state. I took him home from my place, saying to him, "Mr. White, you are not feeling well, you had better let me carry you home." On the way home he threw his arms around me and hugged me and kissed me and began to sing in a very loud voice. He said "the mists were clearing away and that everything would be all right; that there was a new dawn to appear next day, a new world." Then he says, "You have known White to be always poor and never paid his bills, tomorrow everything will be changed." His songs were a jumbled up mess but "Glory to God, etc." seemed to predominate. I took him within about an eighth of a mile of his home, when some one came along on the street with a drove of cattle, and White very suddenly jumped out of the team and said he wanted to see this man and talk with him. I left him with the other man. Later on in the day I saw him with Dr. Frank U. Rich and Officer Connors, with whom I went to White's house I asked him to read the letter that he had read to me to the doctor. He produced it and read it, or portions of it. At first he was calm and then very much excited, finally calming down and knelt in front of Officer Connors, Dr. Rich and the witness, kissed their hands and wished to be forgiven for making such a scene. He called for whiskey several times but none was given him. When I went in the house with Dr. Rich and the officer, Mrs. White preceded us, her husband being at the time near her. I asked her how long she had noticed this condition of Mr. White and she replied that it had been coming on for some time. When I departed I left Officer Connor in charge of the house. On the following day
224 I went to this house for the purpose of having him taken to Concord before the district court there. White was very much excited and ordered us all out of the yard. He said, "I don't want any trouble but I order you all away from my premises." Then he calmed down again and finally his wife prevailed upon him to put on his clothes and go to Concord. He said that he desired to go to Boston to see General Bartlett. Upon arrival at Concord he was

very much excited when he found he was at the court house there instead of Boston and refused to get out of the automobile and got up on the seat and harangued the crowd. He said that Jordan was innocent; that the mists were all clearing away; that he (White) could think properly now, and that he wished eggs for strength. He prayed and asked for eggs. I went with him to Worcester. He sang and kept up conversation all the time, and calling for eggs for strength, and telling everybody that he met they were taking him to Worcester and that he was starved to death and they would not give him anything to eat. He was very loud and noisy all the way.

On cross-examination witness testified that he couldn't say who suggested that he irritate White in order to see what he would do; when it was said to White that the trial had been delayed so that they could get more money, White got mad and very much excited and ordered witness, Officer Connors and Dr. Rich off the premises; witness didn't read the whole of the letter and didn't know whether the letter sheets were all mixed or not; witness didn't have the whole letter in his hand and didn't arrange it and didn't read it from one end to the other; so far as the composition of the letter was concerned all witness testified to was the letter as read to him by Mr. White.

HERBERT W. HASTINGS testified he had known White for about thirteen years, during the last few years of which he had observed that he was very boisterous and at times was very emotional, laughing and crying all the time, gesticulating with his arms, going from one conversation to another, letting both off in the same breath.

The witness testified that he had noticed him in the conduct
225 of his business as an auctioneer, while entertaining a bid he would deliberately stop and tell stories having no application to the business in hand. On one occasion while he was auctioneering some cattle one of White's boys went by, whereupon White stopped right off taking bids and told what a good boy that son was; that he never heard him say Damn; never drank and never smoked, and really it was a boy to be proud of. While he was telling it the tears rolled down his cheeks. He kept this dissertation up for a matter of ten minutes or thereabouts. At another time when he was selling cattle he had one in the yard and was getting bids on it and he stopped to tell of some conversation that he had with Father Crow about the Irish, and as he did so tears ran down his cheek, and he told Father Crow that he should hate to live with them unless there was a priest around them; if he told a funny story he would laugh until the tears ran down his cheeks; I don't think I saw him after the Jordan trial.

On cross-examination the witness testified that the last time he saw White before the trial he met him on the street two or three months previous to the trial; last auction he attended where White officiated was four years ago last August (that is, August, 1905); a few years before that had been intimate with White simply through trading

with him; didn't do a great deal of trading; don't think I have been to the house within the last four years.

JOSEPH G. KEENE, witness offered by the defendant, testified that he was in company with Dakin when they met White between seven and eight on the evening of May 4; that Dakin asked White about the trial; White said his mouth was sealed; he explained a good many things about the case; said he was very tired from watching the prisoner's face; said something about not getting suitable food and that the food was tampered with.

GEORGE H. CHAMPAGNE testified that he had known Willis A. White for about eight years; that about three or four years ago he worked for Mr. White for a few days helping him do his
226 haying; that he observed that Mr. White was cruel to his horses; that when the horse the witness was driving would balk a little Mr. White would run across the field, jab a pitchfork into the horse's quarters, and then the horse would carry the witness and hay rake away down across the field; that he had observed Mr. White in the square in the town of Maynard on different occasions when he was breaking a green horse, and that White would carry with him a large stick, and on occasions he would hit the horse on the neck or around the head, or whatever part of the horse's body happened to be handiest for the moment; that White was a noisy, boisterous kind of man; that when he was driving a horse he would drive him as fast as the horse would go, and as he went along he would gesticulate and holler at everyone he knew; on one occasion about three or four years ago White was sitting on a chair in the drug store where witness was working; that he sat on the chair kind of quiet, and all of a sudden he dropped in a heap on the floor as if his body were lifeless. Witness helped to pick him up and seat him in a chair, and after a while he came to and said, "I am all right," and shortly afterward left the store.

Dr. FRANK U. RICH testified that he had known White around 20 years; that for fifteen years he had been physician to the White family, but during the year and a half prior to the trial had not been so employed. He testified that White was a loud-spoken man who usually accosted everyone with a "How do you do" or "How are you" when he met them on the street, and whether he knew them or not. The witness testified that at times White had been in his office when his conversation was disconnected; that he would drift from one thing to another without completing the conversation, striking out something else. A number of years ago, prior to White's being called to serve upon the jury of the Jordan case, he had been called to attend him on account of an accident which he had received. He had a scar upon his head, which would measure from two inches to
227 two and a half inches long. There was a slight indention so that passing your hand over it you would discover it if you didn't look. At that time he was suffering great pain in his head and the witness was called to relieve him. White said to him

that he was thrown out of a carriage and fell upon his head upon the pavement. The witness was not able to say whether there was a fracture of the external table of the skull. White was a poor business man, slack in his methods. He could not be depended upon. During the last six or eight years he had been farming, sold hay, dealt in horses, had a butcher cart, fish business, table vegetables, solicited orders for fruit trees and shrubbery, was an auctioneer, and some other business which the witness did not recall. In conducting his business as a market gardener he was very irregular in his prices. In one instance he would sell an article at a given price, the next day the price would be twice the amount charged the day previously, and the reverse. On the seventh day of May the witness was called to the White home and found White in an abnormal state of mind—unsound state of mind. After waiting a short time for him he came downstairs and sat down in a rocking chair, he rocked very fast, kept rocking and kept his hands running over his head. He asked his wife to bring him eggs and this being procured drank eggs and milk beaten together. He was engaged in this for ten or fifteen minutes and then opened the door and threatened to throw the officer, the doctor and the selectman out. In a short time, within a few minutes, he was down on his hands and knees, kissing the hands of his visitors and begging their pardon. After asking for more eggs he produced a letter and requested the witness to read it, but finally read it partially himself. The letter was handed to the witness at this time and he read it over twice. The letter was addressed to his wife. During the time that the witness was in the presence of White the latter asked frequently for whiskey, an intoxicant which the witness said he believed White never used. On the next day the witness with Messrs. Connors and Walker went to Concord where, with Dr. Titcomb, they made examination and certificates upon which White was committed to Worcester as an
228 insane person by the justice of the District Court of Northern Middlesex on that same day. Going from White's home to Concord the witness said White was violent, and upon arrival there he began to screech and cry for help. He called upon the Lord to help him. He was very much excited and got his feet against the front of the seat. Had to be carried bodily from the automobile into the court room. While there White told of a brother who was insane and who had been confined in an asylum at Augusta, Me. White said that by reason of the insanity of this brother he (White) "supposed he was crazy"; I can't give the language exactly; it didn't impress me to bother about trying to remember it; but he said something about "supposed he was crazy" or "thought he was" or something of the kind, as long as his brother was; I won't attempt to give the language because I couldn't give it and tell the truth.

Q. Had you an opinion as to whether he was sane or not at the time you ceased to be his family physician?

A. Well, if I was going to say just what I felt, I never felt White was a normal man, normal in mind; he had conditions about him and his actions were such that would impress most anyone——

STEVENS, J.: While he was his family physician he may express

his opinion from what he saw, but it does not appear that he saw him anywhere near the 20th day of April.

The WITNESS: I don't know how much before that.

STEVENS, J.: If he has any opinion while he was family physician at any time—I mean within two or three years—three or four years before.

(By Mr. PRATT:)

Q. Say a year before you ceased to be his family physician, was Willis A. White, doctor, in your opinion a sane man?

A. I don't think he was.

On cross-examination the doctor testified that White's mental condition was first brought to his attention on Friday, May 7, preceding the commitment on Saturday, May 8, by Selectman Arthur
229 A. Walker; after ceasing to be family physician I had nothing to do with the family; the witness was general practitioner; am unable to give an answer to the question as to what in my opinion made White an insane person; I base my opinion on his irregular methods in general, on his disconnected conversation with me at different times, and on his appearance; I believe he deviated from a sane man a good many times, not all the time; he was emotional to the extreme; he seemed to be all right at times. Further cross-examination was as follows:

Q. You stated on your direct examination that he came in to ask you something about making out that bill for his services in tending to a man next door who died?

A. Yes.

Q. And upon that you now fix your memory as an incident where you thought he was insane?

A. That was one of the incidents.

Q. Now, will you tell us the details of that incident?

A. In regard to what he came in for?

Q. Yes.

A. He came in with this bill that he was to render to the man who settled the estate, and he done some nursing in there back and forth with others, and he charged a pretty good price, and he wanted to know if I thought that was too high. "Well," I said, "I have nothing to do about setting your price, Mr. White."

Q. What was the price he charged?

A. I have forgotten how much the bill was, now.

Q. What was the services that he was charging for?

A. Charging for nursing and board, food that they had taken into this man.

Q. For how long a period?

A. I don't know exactly. I can't remember, it didn't impress itself upon my mind strong enough to make a date of it.

Q. It didn't impress itself upon your mind in any way?

A. It impressed itself so strongly on my mind that it was unusual for a man with as healthy appearance as Mr. White had to ask to lie down in my office; something very unusual.

Q. Oh, did that take place at that time?

A. Yes.

230 Q. And that was the thing that fixed itself in your mind?

A. That was one of the things, yes.

Q. Not so much the bill—not so much asking your opinion as to the price?

A. Oh, no.

Q. You didn't fix any price?

A. No.

Q. You didn't attach any consequence to the fact that he had been nursing, did you?

A. Well, what do you mean by consequence in that line. I don't understand your meaning.

Q. Isn't that plain enough?

A. It may be, but I don't understand what you wish to ask.

Q. You are not interested in what I am getting after, are you?

A. No, but I want to answer your question straight, that is all.

Q. That is plain enough, isn't it; you didn't attach any importance or anything to the fact that he had been nursing?

A. Oh, no, because he lived in the other side of the house——

Q. Or that he had furnished food?

A. No, sir.

Q. So that there wasn't anything in that incident that impressed itself on your mind aside from the fact that he wanted to lie down?

A. No, but I remembered it by his having come in.

Q. When did you recall that incident?

A. When did I recall it?

Q. Yes.

A. I can't say exactly when I recalled it—since then, the first time you mean?

Q. Yes.

A. I couldn't tell you as regards that.

Q. Well, now, doctor, is there any other act or incident of insanity that you can tell the court that you think was an insane act?

A. Well, as I said in the first place, if you permit me to express it in a way that will make it intelligent, to be understood, that his general demeanor during my acquaintance with him was not of a sound nature, a man of sound mind.

Q. Did you ever tell him so?

A. Tell who so?

Q. Mr. White.

A. No, sir; I had no occasion.

Q. Did you ever tell his wife so?

A. No, sir.

231 Q. Did you ever tell anybody so?

A. No, sir.

Witness further testified on cross-examination that he didn't consider a mere lapse of memory as any evidence of insanity.

CLARA B. WHITE, wife of Juror Willis White, testified that she and her husband had been married 26 years and had been living on the farm in Maynard, from which White was taken on the eighth of May, for sixteen years; we rented it a few years and then bought it ten or twelve years ago; that she had reared a family of four children, of which the oldest was twenty-one; that all the children were living at home. During this time her husband had been "farming, trading, etc." In 1893 her husband met with an accident by being thrown from a carriage. Dr. Marsh first attended him and afterwards Dr. Rich. The latter had attended her husband and members of the family from the time of the World's Fair up to about five years ago. During this time he had treated White for rheumatism. At times his rheumatism made him sleepless but he was not troubled that way just before he went on jury service. At times it did trouble him but not at that time; that he worked not only long days but a good deal nights; had been eating well before he went away. On Tuesday, night of the verdict, witness testified that her husband came home. He had lunch and went to bed and slept all the night, and that he slept well until the following Wednesday night at about eleven o'clock. At that time he jumped out of bed and said he had to go to Cambridge. I was occupying the same room with him at that time, but he did not go, he went to bed again and lay down. He said that he had to go to Cambridge to see the judge. He was walking around about for fifteen minutes this time, disturbing the other members of the family, and woke up the children. After his again retiring he stayed in bed until next morning until about five o'clock; half-past four usual time for rising, when he walked the floor for a few minutes and then dressed himself and went downstairs. Wednesday morning he went to Boston, but Thursday morning he didn't go away. He didn't leave the house; I didn't
232 notice that he was laboring under any excitement when he got home Wednesday from Boston; he went on the milk team with the oldest boy that night; they left to deliver milk about 3 o'clock in the afternoon. Witness testified that she knew of no business connected with the farm or any of his various lines of endeavor that would naturally take him to Boston on Wednesday morning; that he went upon some mission that was unknown to her. I didn't notice anything unusual about him when he came back from Boston Wednesday; he looked tired; the whole of his face looked pale; when he is sick he looks white across the forehead as though he was tired; he got back from delivering the milk about 7 o'clock; he looked pale; he went to bed about half-past eight Wednesday night. The witness produced certain letters that had been written to her while her husband was upon the jury, but which had not been received by her until after his return. She also identified certain letters which had been written by her husband on Friday, and which she said had been taken from the table by Dr. Rich. (Dr. Rich testified that they had been handed him by White with the request that he mail them.)

CHARLES F. SHIRLAND testified that he had known Mr. White for 15 years; was teamster and farmer; that in the spring of 1909 he was different from what he had been some years before; that in March, 1909, witness employed him to fix a barn door and do some sheathing on the inside of the barn; that he had noticed that Mr. White would shift from one job to the other and that he had instructed him repeatedly to finish work on the barn door first, but he was unable to keep him from changing from one job to the other; that Mr. White worked for witness irregularly during different days covering a period of two or three weeks, and that on two or three occasions he had asked Mr. White to figure the number of hours he had worked and that Mr. White, after trying for a long time to do so, finally gave as a reason for his inability to figure that "his head was not right"; that there were several times when he was de-
233 pressed and said he wished he was dead and out of the way; that on other occasions perhaps between two and three times a day he was elated and sang or hummed church hymns; that he was very much interested in the Jordan case; that he would drop everything when the newspaper arrived daily to see if there was any news about the case; that when he read or talked about the Jordan case he got excited.

On cross-examination witness testified that White read the paper at the noon hour; that he hired White by the hour paying him fifteen cents an hour and his dinner; that White worked eight days and the witness paid him twelve dollars.

JOSEPH P. TEMPLE testified he had known Mr. White ten or twelve years; that in March, 1909, he saw Mr. White at Mr. Temple's place in Marlborough; that White had driven a cow from Maynard to Marlborough, a distance of about ten miles and had come on foot; that when witness first observed him he was sitting in a stable apparently thinking for a period of fifteen or twenty minutes, and without entering into conversation, and suddenly began to cry; that he slid off the chair on to the floor and witness went and helped him to get up and inquired what ailed him, and Mr. White told him that his head felt very badly and it had felt so at times ever since he had been thrown from a wagon some years before; never saw him cry before; he didn't tell me why he cried; since that time saw him with Mr. Perry when he sold Perry a pair of horses; he was all right then; seemed to be in natural spirits; that there were times that he acted more like a man that had been drinking than anything else; he always would do that ever since I knew; he was a fellow that if he had a horse or if he left your barn and went out and got into his team, he would get in and pull out the whip and set him agoing and send him around on one wheel and drive up; he was quite a loud talker at any of those times; I couldn't say exactly what words he might use, but it was get up and hooray around there and use quite a little gab—use the whip; that this had been so during the
234 whole period of witness's acquaintance with him; that on the day in question he said he was going to walk home to Maynard although the carfare was only fifteen cents; I asked him how

he happened to walk, he said he had a couple of horses down home but his wife was using them and wouldn't let him have the horse that he wanted to take that morning to come up with the cow; I asked him how he was going to get home; he said he was going to walk home; I told him he could ride home on the electric cars for fifteen cents; that I should think he would rather go that way than to walk; he said he would rather save the fifteen cents and walk; witness was asked:—

Q. While he was there, what did you observe about his conduct that appeared to you unusual?

A. Well, he sat there; he didn't have a great sight to say any way; acted like a fellow that was kind of down to the heel.

Q. Let me interrupt you to ask you how long he sat there in that manner that you describe?

A. I should say he was there—altogether while he was there at the barn?

Q. No; when you said he was down at the heel.

A. I should say fifteen to twenty minutes.

Q. Sat alone?

A. Well, I was in and out there. He was at the office.

Q. Was there some conversation during that time or did he sit there?

A. No; he kind of sat there, kind of thinking, I suppose, or something or other; he didn't say.

Q. Did he appear to you to be thinking?

A. Yes.

On cross-examination, witness testified that Mr. White was a pretty well known character in Maynard and Stow; his name was almost a household word as a horse dealer; most everybody through that section knew him and knew these peculiarities; knew about his style of driving; his loud talking; I never saw White cry only that time; his usual state was to be in pretty good spirits, that was pretty well known; I have sold him horses; he was considered a good fair
235 horseman; Mr. White knew a horse pretty well; anybody that wanted to inquire about him could easily find out about him anywhere within fifteen or twenty miles of Maynard.

Marshall C. Baldwin testified that he was acquainted with Mr. White for about twelve years; that he was present on the occasion in March, 1909, when Mr. White had the crying spell in the stable at Marlborough, which is described by the witness Temple, and he described what took place on that occasion in substantially the same manner as the witness Temple. He further testified that on that occasion Mr. White complained to him that his head troubled him, and that Mr. White had on a previous occasion in the fall of 1908 complained to witness that his head troubled him; that in the fall of 1908 White worked for witness about a week, and during that period spoke of his head bothering him but said he didn't know whether the trouble was caused by a fall which he had sustained some years previous or whether it was from a sunstroke in the summer of 1908; that Mr. White had said that at times when his head troubled him

he seemed to lose all consciousness for a few minutes; that he would feel weak a little while and then it would pass off, but he thought that his family did not know about it and he did not wish them to knew of it; that in his conversation he would start off upon a certain subject and he would drop it and say, "Well a man is foolish to talk about his family affairs" and things of that kind; that while he was employed by witness on two occasions he said that if he would go to the river and jump overboard and put himself out of the way he would be better off and other people would; that there were days when he was downhearted and depressed and other days when he was cheerful and happy; don't recall that White at any time said anything about the crazy house.

On cross-examination witness testified that White was a well known character in Maynard, Stow and surrounding country; White wasn't the only sane man witness had heard say that other
236 people would be better off if he was out of their way; there was nothing unusual about that; he wasn't the only man witness ever saw fall asleep in a chair; witness didn't know what White had been doing the night before or day before the time that he saw White fall asleep in a chair; he worked for witness baling straw; sometimes White would put in the straw and pull down the lever; straw was baled by hand-press; he was hired by the day and paid a dollar a day and his board; witness had a regular hired man to whom he paid twenty dollars a month and his board.

Perry B. Howard, one of the jurors, offered by the defendant, testified: during the two weeks beginning with the 20th day of April, 1909, I came in daily contact and was in company with Willis A. White; I observed nothing nor did I hear him say anything that indicated any peculiarity of speech, action or manner that was to my mind at all out of the way; he sat opposite the deputy sheriff; three or four jurors sat at the table between Mr. White and myself; he sat beside me in the court room during the trial; observed him no more than usual on Sunday before the verdict when we took our electric car trip; having in mind the fact that he was shortly after the verdict committed to an asylum for the insane, I didn't notice anything in his manner, speech or action which was peculiar or different from the ordinary sane individual; nothing on the trolley ride that attracted my attention except when we were coming down Belmont St., White mentioned a haunted house; there was nothing in his way or manner so far as I know that attracted my attention; don't remember of his remark to anyone outside the car on either of the two car rides; was not present at any time when he was angry with other members of the panel or of any apology on his part, or of any apologizing, begging pardon incident; after he was there four or five days his stomach got out or order; then he began to eat very plain food; he said to me one day that the confinement had been too much for him; witness thought his stomach was out of order; would have to go back to plain food; I am quite sure that he made
237 the statement to me that the confinement had upset him and his stomach was out of order, and he would have to be very

careful what he ate; have seen him take Hunyadi or Veronica water; have seen him write letters in the jury room; never saw any letters nor did he show me any; don't know whether he was drinking tea or coffee or not; I think he used to have toast when his stomach became upset; that was about five days after the commencement of the trial; I think he had a great many eggs; his eating eggs didn't attract my attention; four or five days after the beginning of the trial he was rather dieting until he got back to normal condition; he would take oranges from the table, the rest of us would take some if we wanted them; he would have some done up in a paper bag after four or five days when he was getting down to plain food; wouldn't say it was ten days after the confinement commenced that he found it necessary to change his food; I didn't see why White could get any impression that some of the members of the panel were putting something in his food to render him less capable of serving as an intelligent or useful juror; I can't recall anything which would lead me to say or from which it might be informed by the court that at any time during the trial White did have a delusion that some of the members of the panel were putting something in his food to render him less capable of serving as an intelligent and useful juror upon the panel.

Juror JAMES CULHANE testified that two or three days after the trial begun he noticed that Willis White was acting different than the other jurors, his actions were different from the other men, he was flighty. In conversation he would get a little huffy with what was being said, and then he would immediately apologize. I noticed this two or three times a day. He was constantly writing letters whenever he got a minute's rest. He would write for a while and then run upstairs and run right back again, and this was how I first made up my mind there was something wrong with him. At the table he would object to part of his meals and called for other food instead, push the dishes to one side and call for something
238 else. This happened frequently. He refused to take tea during the last week and instead took hot water with milk in it. During the trolley ride on the Sunday previous to the verdict, when we had stopped to turn back there were some ladies on the side of the street and he stood up in the car and waived to them. The sheriff reprimanded him and I said that that was right, and he immediately jumped up and asked me what right I had to interfere. On Monday morning after this ride White talked with the sheriff and wanted to know what his rights were, and the sheriff told him that he would be all right, and talked with him and quieted him, and then immediately White jumped right back and threw himself on his knees and apologized to me. I felt that he was apologizing for what he said to me on the day previous while on the trolley ride.

At dinner on the day of the Jordan verdict White read aloud a letter which he had written to his wife concerning the trolley ride on the Sunday previous.

He said nothing to me which expressed a thought that I or other members of the panel were putting something in his food to render him less capable of an intelligent determination of the case.

On cross-examination witness testified, it didn't occur to me at any time that Mr. White was an insane person or that he didn't understand the proceedings in which he was taking so important a part.

On redirect examination witness testified, I wouldn't say White apologized to anybody but me; there were probably four or five standing with me; I wouldn't say White apologized to them; I believe Mr. Cullen was standing with the others before we marched out.

JOHN CULLEN, one of the jurors, offered by the defendant, testified: I have met and seen Juror White; during the time that I was with him, I didn't see anything in his manner, speech or action which indicated that he was different at that time or at any part of the time from a normal sane person; he was different from some men; he was a man who would talk a great deal; in that way
239 he differed from men who don't have a great deal to say; so far as I heard his talk, it was intelligent; he talked a good deal about the trading of horses; I sat at his right at the table; there were a few times that he asked for something different than what was stated by the young lady to be served; those few times must have been within the last week; didn't notice anything more about him in retiring from the jury room than any other member; didn't see him on the Monday immediately preceding the verdict get down on his knees to Mr. Culhane nor did I have any recollection of any such thing; remember ride of the day before; heard of some disturbance; he may have knocked on the window to somebody and got called down for it; I didn't see it; didn't learn of that fact and didn't see White apologize to anybody; didn't make any remarks to me that he was dissatisfied with his food; heard him ask the sheriff what his rights were; don't recollect of his reading any letter at the table after the verdict; pretty sure we all left the table together; White came back to the court house; if I recollect right they were all there at dinner; then I came back and got my pay; don't recollect anything of his reading the letter to his wife; with the fact in mind that Mr. White is now confined in an insane asylum, I saw nothing which would indicate that White during the trial was not a normal person mentally; he sat back of me on the panel; never noticed that White would tilt his chair back and rock; saw that he wrote many letters more than the most of them; I never heard him read any letter to members of the panel, nor saw him read any; noticed him use hot water at meals, during the last week of the trial; Mr. Culhane sat on his left; I was not disturbed at any time by White's restlessness; am sound sleeper; takes quite a commotion to wake me up.

GEORGE B. VAUGHAN, one of the jurors, offered by the defendant, testified: I was never disturbed by any restlessness on the part of White; didn't see anything in the speech, manner, actions or talk of Juror White different from that of the ordinary normal sane indi-

vidual; didn't know of the matter in the electric car; if it was
240 talked about by the other jurors, it wasn't to the extent that it got to me; I believe his food disagreed with him or else the water he was taking. I don't know which; he took no more water than the rest of us; his food disagreed with him somewhere about midway of the trial; I took no particular notice of it; I sat at the table at the right of Mr. Cullen; it seems to me White made a change in his food about midway of the trial; once or twice he ordered something different from what the girl stated; I took no particular notice; I know he took to drinking hot water and milk; can't fix the time; my impression would be it was along the latter part of the trial; recall nothing unusual on Monday morning when we lined up to go into the court room; never saw White on his knees; don't recall that day any more than any other day; his manner and speech were usually pleasant; can't say I ever saw him boisterous, excited, morose, sullen or exhilarated; don't know the difference between exhilarated and cheerful; don't recall that on April 30, Friday night before the verdict he was unduly or unusually cheerful or exhilarated; saw him writing letters; took him quite a while to write them; would write a few lines now and the next time he had a little leisure would write a few more; took every opportunity he had of writing a letter; don't know he went back and forth from sleeping room to jury room above any more than the rest of us; having in mind that Mr. White is now insane, I didn't see anything in his action, speech or manner that indicated that he might have been suffering under a mental strain at the time he was sitting on the panel; he would take sometimes two or three sittings to finish a letter; haven't seen his letters lying around.

Juror THOMAS F. STAFFORD testified he noticed that White's conduct and manner was different from the other jurors; that the first he noticed was about his letter writing; that he wrote a great many, and writing them spasmodically; that the first time that he noticed this particularly was about the fourth or fifth day of the trial; that he noticed White get hysterical one day at table and cried.
241 He made a remark one day that he wanted to know who Mr. Higgins, the district attorney, was working for, whether it was for Jordan or against him. He had a habit of calling the other jurors "brother," and on one day he said to the witness "would you believe me," he says, "that I am all mixed up the last couple of days" he says, "I don't know how this thing has been going on but," he says, "everything is all right now, it is all right now," he says; that he noticed at the dinner table White was incessantly talking; "that you could not get a word in edgeways between them." We had to cut him out once in a while, somebody had to break in and then he would stop; that he had heard White claim his food was doped; that he heard him make this claim to two or three of the other jurors; that he heard him make it to the high sheriff and the deputies; that he saw him refuse to eat the regular food and call for other food; that he noticed White acted very queerly during the last week; that he noticed him in the jury room put his hands across his

breast and rock, though seated in a straight chair; that during the last of the trial "he didn't know what he was doing." I think I have told you pretty near all that I can think of at the present time; I didn't see White offering an apology to Mr. Culhane on the Monday morning just before the verdict; I didn't notice anything peculiar about his memory during the fifteen days we were locked up.

That during the progress of the trial, White acted in a very peculiar manner; that witness first thought that he acted queerly about a week before the end of the trial; that up to a certain time, White seemed to understand the proceedings, but that he did not seem to understand the proceedings about a week before the end of the trial; that the first thing that led the witness to think that, was that White did not know whether the district attorney was working for Jordan or against him; that White was all mixed up and did not know whether the district attorney was for Jordan or prosecuting him, whether he was advocating his case or prosecuting his case,
242 and that was the way he asked the question; that witness called the attention of three or four of the different jurors to that fact at that time; that at the last end of the trial, the witness thought that White did not know what he was doing; that the reason why he thought he didn't know what he was doing was the way that White acted with reference to the district attorney and in reference to refusing to eat the food that the jury all ate and with reference to his letter writing, and in addition the acts of White on the last trolley trip; that the jury rode about 30 miles on that day, and that witness did not think that White sat down five out of the thirty; that he was standing up, hanging on to the strap when there was plenty of room for him to sit down; that it occurred to the witness at the time as being remarkable; that witness thought that White did not know what he was doing at the time; also the altercations that White had with Mr. Culhane affected the witness. This also was not about ladies, they were young boys or young men. White did not discuss the evidence any. Witness couldn't notice anything peculiar about White's memory. Witness didn't discuss the evidence with White.

Juror Jerry P. Morrill testified in answer to a question as to whether or not he had observed anything in the speech, action, manner or conversation of Juror White, which was different from the normal sane man answered that he did the last few days of the trial.

Q. Will you tell the court when you first noticed it?

A. He did not appear very rational the last——

Q. I know; when, Mr. Morrill? Keep your voice up. When did you first notice that anything about White was different from the normal, sane man?

A. The last two or three days of the trial.

He noticed his conduct with reference to writing of letters, his habit of getting up from letter writing and walking around and returning to write more, and that he had learned from the other jurors of White's conduct while on the trolley ride on Sunday

previous to the verdict; heard him make no complaint about
243 his food; didn't hear him say that his food had been doped; didn't hear anybody else say it in his presence; didn't observe anything of White's sleeplessness or restlessness; can't tell anything else which I saw or which was brought to my attention which indicated to me that during any part of the trial he was not a normal, sane man; didn't see him apologize to Culhane.

On cross-examination witness testified there was more or less joking going on about changing drinks; a good deal of joking going on between the different members of the jury, more or less in regard to personal characteristics; don't believe I could answer the question whether I saw anything in White's conduct, manner or speech which indicated that he didn't understand the nature of the proceedings in which he was taking so important a part; the last day when we went out to hear the case, after we got the charge to the jury, he worked all right as far as I know until after we got out and was through with the jury; that was after the verdict had been given and on the way home; up to that time, as far as I could observe, I didn't see anything in his act, conduct or speech that showed he didn't know the kind of proceeding he was in; noticed nothing defective in his memory; as far as I know his memory was as good as the average juror's; he appeared to understand the proceedings and the part that he took in them.

On redirect examination witness testified that when the picture of the jury was taken, White wanted to be back in the back seat in the picture and the sheriff told him to sit down in the front row; he got kind of provoked about that; he wanted two or three pictures; sheriff asked him if one was enough; White said he wanted three.

Juror TIMOTHY F. SHEEHAN testified he noticed that White was different from the other jurors in his conduct and manner; that about the eighth or ninth day of the trial White said to witness, "Mr. Sheehan, I think they are putting something in our food down there, I have been up and down all night." So I said for a joke "of course they are; they are feeding us so high they have to put
something in it to keep us down." The witness saw that
244 White was serious and dropped it right away. Mr. Cullen picked it up and said something more to White. Witness got dressed as quick as he could and went off upstairs. He heard White later talking to the deputy sheriffs about it; after that I heard him say that he wouldn't eat any more food but what he knew what it was; when we went to breakfast he called for eggs and a glass to break them in; that White seemed to be nervous all the time, moving around and was writing letters all the time; he would write awhile and then he would get up and go into another room and sit and talk and go downstairs, and while he was gone his letters would be lying on the table exposed so that anyone could read them; that he had read in the presence of the jurors a letter which he had written to his wife concerning the trolley ride; that on the day of the trolley ride he was nervous and stood up most of the way, although there was

plenty of room to sit down; that he had heard him ask the sheriff or say to the sheriff that "he knew his rights"; that when the pictures of the jury was taken he got huffy and said he would not buy a picture because he was not allowed to sit where he wanted to sit; and while the jurors were playing cards in the evening, White was restless and while some one was dealing he would balance his chair backward and rock back and forth, humming to himself; don't remember any conversation in which he remarked about his ability or inability to comprehend things that were going on about him.

On cross-examination the witness testified as follows:—

(By Mr. Higgins:)

Q. Mr. Sheehan, this talk about putting something in the food was a good deal in the nature of a jolly on White, wasn't it?

A. Yes.

Q. And the other members of the panel joined in the jolly?

A. Well, only——

Q. Some of them?

A. Mr. Cullen.

Q. Just Mr. Cullen?

A. Yes.

Q. And you think that White got serious about it?

A. Yes, sir.

245 Q. And as a result of that he confined his diet more exclusively to eggs than before?

A. Yes, sir.

Some of the jurors jollied him more or less; they jollied each other as they generally do when there is a crowd together; it was all good nature; didn't notice anything about White's memory that was defective more than any other of the jurors; he appeared to be as much interested in the trial as any other juror; when he said there was something in the food and that he had been up all night, I understood that he meant that he had been to the toilet.

When the witness saw White eating eggs at the time the other members of the panel were eating meat the eggs were served in the shell and White himself broke them; that White was all in earnest when he spoke to the witness about their putting something in his food. Witness did not think anything about it until after he said it; he saw White was serious.

Thomas Smallwood, another of the jurors, testified: I didn't notice anything in White's conduct, manner or speech which indicated that he was different from the ordinary normal individual; heard him say nothing about his food; saw him write letters; didn't see him leave any; saw him on the ride the Sunday before the verdict; he was in the front end sitting down; was sitting down every time I saw him; didn't know anything about his attracting the attention of anybody; heard nothing about it until today; didn't see him on his knees; didn't hear him beg Culhane's pardon; I used to be the last juror to go to bed and the first one up in the morning;

I went to bed about 12.30 and got up about 4.30; could wake up most any time; wasn't disturbed by Mr. White during the night; didn't monopolize most of the conversation at the table; would talk loud if anybody spoke to him; if anybody didn't speak to him, he wouldn't say nothing; he was kind of quiet; wouldn't bring up a conversation unless it was broached to him; he had a loud voice anyway; he was nervous; if you said anything to him that
246 didn't suit him, he would get a little excited over it; don't know of any altercation that he had with any other member of the jury; I didn't see the show of temper in regard to the picture taking, but heard of it afterwards; I heard somebody say to him, "Go and get a ball"; he said, "I will never forget what my dear old mother said when she was on her death bed; she said she hoped her sons would never die in a drunkard's grave." That was at the table; he cried; he didn't become hysterical; it only lasted a few minutes, then he was laughing; shouldn't think it was fair to characterize it as hysterical; noticed nothing to indicate that he was different in any way from the normal man; took no particular notice of him no more than any of the others; never saw him drink soda or cream of tartar; he drank mostly milk and hot water; have seen him eat bread and milk in a bowl when others would have tea or coffee or milk.

On cross-examination by the district attorney, witness testified as follows:—

Q. When Mr. White spoke about his mother and cried, did he immediately begin to laugh?

A. Oh, no, no; there was an intermission; it wasn't a case of laughing and crying and laughing and crying. I understand what is meant by the normal man. I didn't observe anything in the speech, acts or conduct of Mr. White different from the normal man.

Newell L. Felton, one of the jurors, offered by the defendant, testified: I noticed nothing in the conduct, speech, manner or anything different from the normal sane man, no more so than any other man in the same circumstances that White happened to be back in the woods, farmer-like, rough and boisterous; he was always looking for a good time and having a good time with everybody; shouldn't say there was anything out of the normal, sane man; knew about his not eating meat when others ate it; I heard he thought something had been done to it; sometimes he would change from the regular meal and sometimes the rest of us would change; I did so often times myself; I know of no other member who
247 felt or claimed or expressed that the food was being doctored; I heard White did; I noticed that he was eating food different from the rest of us towards the latter part of the trial; sometimes boiled eggs, sometimes steak; I heard him say he had left off drinking tea; once in a while he would take away a number of oranges in a bag; we all took oranges away in preference to eating them there; saw him writing letters; don't know as he was

any different from any of the rest of us in writing; he generally wrote his letters upstairs; couldn't say that I have seen him stop in the middle of a letter and leave the letter on the table so anybody might see it; noticed White on Sunday ride; some of the way sitting down, other times he would stand up; same as some of the rest of us would; he was not standing up holding on to a strap most of the time; no reason why I should observe White any more than the rest of the jurors; I remember the time when the leputy sheriff and one of the other jurors reprimanded White for simply waving his hand; I happened to be sitting directly opposite White; I didn't make any remark about it; one of the jurors spoke to him and then the sheriff spoke to him; I couldn't say whether they were boys, girls or young men that he waved his hand to; he was standing up at that time; I wouldn't want to say whether he was ugly or not; I remember the incident about the photograph; would say he was a little mite obstinate; didn't know about White begging Culhane's pardon next morning; I don't know as he was any more nervous than some of us; couldn't say that I noticed him balancing himself on the hind legs of a chair and rocking; don't recall incident about White's mother; never heard him say his gizzard was being cracked, "cheer up brother," or anything of that sort; that "the mists were clearing away"; he didn't talk to me about the religious services anything more than to say that he enjoyed himself for an hour or an hour and a half or so; recollect his saying after coming from church that he enjoyed himself and passed the time better than he would laying around the jury room; never said to me that because of the sermon in the Catholic church on the last Sun-
248 day before the verdict, because of those services, he had experienced a change of faith, and it had done him good; I am positive he didn't say he had experienced a change of faith, or that he had seen a new religious light.

On cross-examination by the district attorney, Mr. Felton testified that at the time the photograph of the Jordan jury was being taken, Mr. White wanted to sit in the back row as he sat during the trial, namely, the last seat on the end of the back row; he wanted to sit in the same relative position in the picture as he sat during the trial and he was provoked when they put him up in front.

Ottar T. Bryn, one of the jurors, offered by the defendant, testified: he was probably a little different from the ordinary normal sane person, a little loud of speaking, probably gesticulating a little more; nothing else that I should call extraordinary; saw him occasionally letter writing; didn't notice that he ever left his letter exposed; he wasn't nervous while writing that I could see; frequently when doing nothing else, he would change around from one place to another; didn't see him rock in a tilted chair rapidly; should call it nervousness when he at one time at the table spoke about his mother; heard that mentioned; his voice kind of choked a little, didn't hear him laugh immediately afterwards; somebody understood he was affected, they cracked a little joke and so he com-

menced to laugh; the strain of the situation was relieved; shouldn't say he monopolized the conversation; he did seem to like to talk; he talked loudly and generally laughed with the rest if there was anything to laugh at; never heard him say to the sheriff that something had been put in his food; I simply heard of his complaint through some of the others; I didn't understand it that way that something had been put in his food only he had complained that he had eaten something that didn't agree with him; once I heard him ask for some eggs instead of chops or beefsteak that morning; I think he said so much meat wouldn't agree with him; there is nothing that enables me to recall anything as I look back upon it in
view of the light we now have as to the mental condition of
249 White which enables me to say that I saw him do or heard
him say anything that indicated at that time during the fifteen days I was with him that he was other than a normal man.

Juror TIMOTHY F. HURLEY testified that White was peculiar but nothing that I should say was abnormal other than peculiarities that any normal man would have; he was boisterous, loud talking, would tell a story and would think it was very funny, I couldn't see any point to it; something about some of his neighbors, stories his neighbors would tell about some one else, he thought very funny; in the matter of food, I thought it was peculiar but I could account for that in a way; I didn't think he was of unsound mind; one time in conversation about men in the navy and some other occupations where men are confined for a long time, I said I had been told that it was the custom to dope their food; he took it serious and applied it to his own case; he understood just what I was talking of and what I meant and he took it to himself; he thought it might possibly be done there; he didn't say he thought it was done to me, after a week or ten days, not earlier than that, perhaps five or six or seven days before the conclusion of the trial, he ordered something different from what was served for our meals; not only eggs, he would order other things; his idea was as I gathered it that whatever was prepared ready for us had been fixed in that way and he wanted to get something and he would spring on them a surprise and get it without giving them an opportunity to fix it; he told me considerable about his home life and his work and occupation since he was a boy; I didn't consider him excitable during that time; saw him writing letters; never saw him leave them; have seen him stop writing, fold them up, put them in his pocket, but that only when he was called from our room to breakfast, or to come from our rooms to the court room; never saw him stop writing on other occasions; never saw him read a letter that he had written; heard him read one that he had received; I think it was one from a man with
whom he had business dealings; I think that every one was
250 at the last meal though I wouldn't be positively certain; he
didn't read any letter at all in my presence that he had written; I didn't see the incident about the picture; I was told that; sometimes he would come and ask questions about things which were in the paper, I thought he didn't grasp it quite as he should

and it bothered me; I would probably be reading myself and didn't like to be interrupted; he wouldn't ask me to explain things which he found in the paper, he wanted to talk about them; he felt like getting into conversation and probably wanted to talk; didn't notice he was unduly excited at any time or that he was morose or blue; didn't consider him morose at all at any time; he was jolly though not hilariously; was one time I thought he was hilarious, that was at the time of receiving this letter; he said it meant a great deal to him, one that he read to me, meant a great deal to him and he seemed very much elated; never heard him speak about business troubles; have heard him speak often of his business affairs; he gave me the impression he was in quite a number at the same time; I thought he was a pretty busy man; he didn't attempt to create the impression that he was succeeding in them; I gathered that he was but that he had to work pretty hard to do so, it kept him busy all the time, but he was getting along; not bragging, just saying what he was doing; didn't see the incident in the car at Waverley; heard of it; didn't see him beg Culhane's pardon; didn't hear of it until Culhane spoke of it today; remember the incident of White crying at the table; I thought it more of a blubber than a cry; was crying just as any man who was speaking of his mother who had passed away and whom he thought a great deal of; speaking of having made a promise to her; it was under such conditions that it was rational for a man of his years to blubber; I know he was 58 years old, am not as old as that, but I have done it; I mean by blubbering to almost cry, tears come to my eyes, roll down my cheeks, lose my voice, my throat fill up; that's what I saw in Mr. White; didn't hear of the first of it; but when his voice broke then I noticed
251 and heard him speak of having promised his mother not to fill a drunkard's grave; told me the same story afterwards; didn't cry then or blubber; apparently felt serious but no moving emotion; he applied temperance to himself but didn't speak temperance as applied to everybody; he showed only strong feeling; am pretty sure he spoke to me once of a brother, lost his voice and cried more than he did at the table; we were alone and I suppose he felt he could let go and cried perhaps for a minute; brother was dead; didn't say about his being insane; he spoke of a brother who had fits; didn't speak of it as insane.

James C. Herring, a deputy sheriff in attendance at the jail in East Cambridge, testified that on Tuesday, May 4th, the day of the Jordan verdict, towards five o'clock in the afternoon, Juror White called at the jail and asked to see "John," and upon inquiry as to whom was meant by "John," he said "the sheriff." He was told that he could see the sheriff at his house, which is next door to the jail, and thereupon Mr. White left the jail and was gone long enough so that he had sufficient time to have called at the house of the sheriff, but he returned to the jail and upon inquiry as to whether or not he found the sheriff, said, "Let it go, I'll be down in a day or two, and I will see him then." Thereupon the witness said "you found a verdict in spite of expert testimony, didn't you?"

White then turned from side to side, looked in one direction and then the other, put his hands to his hips, made no answer and off he went. Witness in describing the conduct of Mr. White during his call at the jail said that he acted like an intoxicated man, although he didn't get near enough to smell any liquor on him. The time when Mr. White called at the jail was about three or four hours after the verdict had been rendered in the Jordan case; he said nothing about desiring to see Jordan at that time, or of getting a permit to see Jordan.

EDWARD E. CHASE, a witness offered by the defendant, testified that he was judge of probate of Hancock County, Maine, one of the trustees of the insane hospital in Maine for four years; a
252 former member of the governor's council; knew Oscar White, a brother of Willis A. White; had lived in Blue Hill for ten years; he was committed to an insane asylum at Bangor in July, 1901.

On cross-examination by the district attorney, the judge testified that two of Oscar White's daughters had worked at his house; that he knew Oscar had been a little peculiar for some years; that he remembered that Oscar had an operation on his head to remove a clot of blood from his brain and it was after that operation that he became insane and was sent to the asylum.

On redirect the judge testified that Oscar was peculiar in that he was morose, odd and distant; he didn't look up to speak as you went by.

BIGELOW T. SANBORN, a physician, an expert in diseases of the brain and insanity, and for forty-three years superintendent of and connected with the state asylum at Augusta, Me., testified, "I examined White on October 1st in Worcester; had some conversation with Dr. Quinby; I saw White, he was absolutely silent; couldn't get his eyes at all; stopped a few moments in the room; noticed his physiognomy; he had a peculiar look; gave evidence of being quite restless, shaking head a little, but kept his face from my vision; I found it was useless to continue longer in the room and came out; that is the only time I have seen him; he was insane at that time; I have heard or read all the evidence offered in support of the motion for a new trial; from what I have seen of White, from what I have read of the evidence and from what I have heard in court, from my knowledge of the brother Oscar, taking everything into consideration, I have no hesitation in pronouncing him an insane man."

Q. At the time of the rendition of his verdict?

A. Yes.

Mr. HIGGINS: He did not say that.

Mr. PRATT: Well, I ask him if his opinion relates to that time and previously.

The WITNESS: What?

Q. You say you have no hesitation in saying that he was
253 an insane man? I understand that by that you mean that he was insane at the time of his return of his verdict in court, on the 4th day of May?

A. I think so.
Q. And previously, doctor?
A. I think so.

On cross-examination witness testified that he had assumed that what the witnesses told in the court here was true; if, however, those statements were not true in the way that they were described, if I had no other knowledge, if I hadn't an opportunity of examining the man, I might be apt to change my opinion; the positive evidence that I had in mind in forming my opinion, so far as the jurors are concerned, is the evidence that he has told several of the members of the panel that he believed that he had been drugged; that some one had put stuff into his food to destroy his mind and to make him think as they did; his peculiar actions in finding fault with them and then very soon after coming and asking their forgiveness, and bowing down and putting himself upon his knees; that happened quite a number of times, if I remember the evidence correctly; then his not taking the food and calling for eggs; calling for uncracked eggs is a very common thing for an insane person to do; it is not uncommon for sane people to call for boiled eggs, but he called for the eggs for a certain purpose; heard jurors testify that there was a good deal of jollying done with White, and that this question of drugging food was in the nature of a jolly; don't remember the names of the jurors that White got down on his knees to; he got down on his knees to the sheriff; I had in mind everything that transpired before the trial; while he was on the farm, during the trial, subsequent to the trial; all that I have heard concerning his life; I don't think that I had any history of White before I went to the hospital to see him; not certain whether I was told anything about him before I went out; I had some evidence sent me before these hearings began; I had some history of what White had been doing before I went out to Worcester.

254 Redirect examination.

(By STEVENS, J.:)

Q. Doctor, when was the first time in Willis A. White's life when you are able to express an opinion he was insane?

The WITNESS: I think he has exhibited peculiarities all his days and these peculiarities, eccentricities have developed into a type of insanity; that type of insanity is one which is very variable; I think there have been times from young manhood when he has not been himself. That has worn off; he has had better days as he will now when he will approach sanity, but I believe his mind has been morbid for years; I think he was unquestionably insane before the Jordan trial commenced.

(By STEVENS, J.:)

Q. Well, do you think he was for any considerable length of time insane before that?

A. I think he had had periods—He is suffering from acute mania or what nowadays we call manic depression—state. Well, now, that

is really mania alternating with melancholia. He will have a brief period of mania, then he will lapse over into melancholia, morbid all the time, but in the period passing from mania to melancholia, he is running along nearer sanity, but I don't think he has or has had for a good while a condition of sanity, approximating the same as we hope we do.

(By BELL, J.:)

Q. Is there any technical name for his disease?

A. Sir?

Q. Have you any technical name for his disease, his mental disease?

A. Why, yes, I call it a manic depression; insanity or manic state, I do because the books call it that, but I think the better name is mania.

Q. That is as near as you can come?

A. That is the nearest; that is his type in my judgment.

Q. But are there not forms of mania?

A. What?

Q. Are there not different forms of mania discriminated by physicians?

A. Why, yes, named after—for instance, if a person is
255 inclined to suicide, suicidal mania, and all of the various—having the type of the character, namely, the kind of mania.

BELL, J.: That is all as far as I am concerned.

On redirect examination, witness further testified, there was a great similarity between the condition of Oscar White and the condition of Willis White, as disclosed by the testimony; the prominent feature was the bad feeling of the head; you will notice that often in the same families; the same type seems to follow or exist.

On recross examination, witness testified that the record in Oscar White's case disclosed that Oscar White suffered from homicidal insanity; I don't know that Willis White was afflicted with any kind of homicidal insanity; I don't think he had it in his heart to kill unless he lost his entire self control, but a sane man might do that; I wouldn't state as my professional opinion that I have any positive evidence upon which I could base my opinion that Willis White was suffering from homicidal insanity; from what I can gather from the evidence it impressed me that his mental trouble was more or less intermittent. Now, I don't mean to say by that that he thoroughly recovered. That disease was transplanted in him by his parents, that is, it is heredity. I know nothing about the bodily health of Mr. White, except from the testimony of his activity, walking nights; I made no physical examination to observe whether he was suffering from any disease; I think Dr. Quinby said to me, "He is suffering from bright's disease." Taking a man of his calibre, education and training, the excitement and strain of such a trial as the Jordan trial might be a cause for an attack of acute mania; reaction might result in an attack of acute mania.

(By STEVENS, J.:)

Q. Do you think, Doctor before this trial he should have been committed to the insane asylum?

A. Yes, your Honor, for his own good. The wife said that he had been insane for a good many years.

256 DR. WILLIAM MCDONALD, an alienist, formerly connected with the Butler Asylum for the insane at Providence, who had been present during the trial and had an opportunity to observe Juror White, and who had had an opportunity of examining him at the Worcester Insane Hospital subsequent to the trial, to wit, on June 11, 1909, was asked:—

Q. From what you have heard of the testimony in court, what you have read of the testimony and your observation of Mr. White at the institution at Worcester, having in mind that the verdict in the Jordan trial was rendered about noon on May 4th last, what do you say as to whether or not Willis White was insane at the time of the rendering of the verdict, and previous thereto?

A. How long previous?

Q. I won't undertake to fix the time. You may do so.

A. Well, if I may answer that question in my own words, from all that I have heard and seen of Mr. White, I should say that before the rendering of that verdict he was certainly an extremely unstable man, and one by reason of heredity, and one by reason of his own constitution predisposed towards insanity; and I would say—I don't believe that I would be willing to say that I had evidence enough to say that he was insane previous to the trial. I think that some of the attacks that certain witnesses have described here are extremely suggestive and extremely suspicious—his attacks of depression and excitement, of boisterous conduct, of loud talking, of weeping over what, as far as I could judge from the testimony, was a trivial thing, but I think that the testimony goes to show, and what I have seen of White leads me to the opinion that Mr. White sometime during the trial of Chester Jordan was certainly insane. I should be willing to state as my opinion that on the day preceding the verdict Willis White was insane, on the day of the rendering of the verdict, and in my opinion thereafter.

Q. I want to call your attention, Doctor, to the testimony of a witness who testified with reference to a period the latter part of February, or the early part of March, when, as he described it, Mr.

257 White sat in his place of business, sat with his head down, apparently dejected, when the witness talked with him, he spoke of his troubles and cried; his general demeanor was that of dejection, and ask you if you are able to give an opinion as to whether or not that might have been a mental attack?

A. Well, I don't think that I have any right to assume that it was on the testimony as given. I think that a number of those sort of things that have been described are suspicious, that he was an unstable man; that he was prone to ups and downs; periods of excitement and elation, going above the normal and periods of depression

below the normal, but as to whether that particular incident, at that particular time Mr. White was insane, was afflicted with insane depression or insane melancholia, I don't think I have a right to state on the evidence.

Q. I will ask you if some of the incidents which had been described as having taken place previous to the time as he sat as a juror are such as are frequently found in patients that subsequently get into insane hospitals?

A. Yes, sir, that is quite true.

On cross-examination, witness testified, it is the degree and frequency of the periods of depression and elation which decide the abnormality of it; the degree must be measured by the standard of the person himself in his normal condition, and also by the standard of the average run of human beings as we know them; you must always take into consideration the person's natural disposition, so that if a man is naturally boisterous you have to look a little further for something else before you can attach much importance to the mere boisterousness of the man, and if he is naturally a man that gesticulates more or less, you must take other things into account before you attach much importance to his gesticulating; if a quiet-spoken person suddenly became loud and boisterous, you would attach a great deal more significance to that change; if a good-natured person who is happy and social suddenly becomes depressed, you would attach more importance to that incident than you would to a man who has his ups and downs that may be natural, easily
258 exhilarated or easily depressed over small things; would want to know the cause of any act of depression, and knowing that it was a reasonable cause, wouldn't attach any significance to the depression as being suspicious of insanity; supposing that Mr. White was heavily in debt, as there is some evidence of that here, that would be cause for him to be depressed; if you have a reasonable cause to ascribe for the depression or the exhilaration, you wouldn't attach much suspicion to it. The great suspicion attaches when you can't give a reasonable cause for the emotions observed; Mr. White was apparently a man of ups and downs; easily exhilarated and easily depressed; wouldn't say that they were very suspicious if I had a reasonable adequate cause and knew the height and degree of depression and exhilaration; I think the testimony here in insufficient for me to base an opinion upon to the effect that White was insane the day he was sworn in as a juror; I didn't enter the court room during the trial of the Jordan case until the latter part of the trial. He further testified on cross-examination as follows:—

Q. Now, Doctor, what is there that is positive evidence, as Dr. Sanborn calls it, upon which you based your opinion that on the day before the verdict he was insane?

A. On the day before the verdict my attention was drawn closely to Mr. White himself. I had noticed him throughout the trial and I think—as probably most people did, because of certain peculiarities—he simply attracted my attention. I did not think of it in any way as indication of insanity or sanity, one way or the other.

On the last day of the trial those peculiarities of his became so marked, so exaggerated, that I was struck with Mr. White's condition very much, wondered to a considerable degree about it.

Q. Well, were you struck at that particular time or does your mind now go back to that time?

A. Yes, my mind—I remember distinctly things about Mr. White that occurred in the jury room, or in the court room, as he sat over there—that——

Q. Did you call counsel's attention to it?

A. Not specifically and not until the last day of the trial,
259 and after the trial had—after the case had gone to the jury. We were going out on the side over here and I turned to Mr. Pratt and Mr. Sullivan and said—I think my words were—"talk about Jordan,—I would like a chance to look at that man White."

Q. That was before the verdict was rendered?

A. It was after the case had been given to the jury; it was the last day.

Q. And at that time you had then some doubts as to his sanity?

A. I had.

Q. And you communicated those to the counsel?

A. Well, merely in a——

Q. In the way that you——

A. I don't know as I ought to say that I gave it to the counsel in such a way as to—impress it very much on their minds. We were talking out all together, joking more or less, and—I don't know how much weight counsel attached to my remarks.

Q. Was it said more in the nature of a joke, Doctor, than being serious?

A. I think it was more or less of a pleasantry, although there was a sober conviction in my mind——

Q. That was in your mind?

A. Yes.

Q. You did not convey to counsel that it was anything more than a pleasantry?

A. No, I don't think they knew——

Q. As far as they were concerned, they simply took your remark as a pleasant off-hand joke?

A. I think that is all they were warranted in taking it.

Q. Because from certain peculiarities that he might be looked upon as a man that was queer to say the least?

A. Yes.

Mr. HIGGINS: That is all.

(By BELL, J.:)

Q. What were these peculiarities, Doctor? We have not had them before.

A. Well, your Honor, if you will remember, when I was giving the testimony in regard to the homicide—Jordan's—as he described it to me, the things he did to the body—my attention was struck in looking at the jury at that time by White suddenly laughing

during the gruesome details. He had a way of folding his
260 arms and rocking back and forth and leaning back, and at that time as I described them I was rather surprised to see White laugh, because the details were such as not to seem to me to suggest laughter. And later, on the last day of the trial, I noticed White crying. Then the particular thing that attracted my attention was his extreme listlessness—which in itself, of course, is not a symptom of insanity, but with other things—his pressure toward activity, as we call it, the inner unrest was extremely suggestive. He seemed unable to sit still a single second; he was leaning forward, leaning to that way here, then leaning back in his chair and constantly in motion, constantly rocking. And his face—the facial expression on his face—was to me very expressive—the constant change of expression. It seemed to me that the man was in an extremely unstable condition.

(By Mr. HIGGINS:)

Q. That suggests a question, Doctor, that I meant to have asked you before in reference to the evidence of this uneasiness and unrest. That is a sort of a forerunner of an attack, isn't it?

A. Well, it may or may not be. A patient who suddenly breaks out in a violent mania may for a long time have been troubled with a retardation, unable to move, which is just the opposite. These symptoms all go in opposites. The ups and downs in mood are accompanied with just the same extreme activity of body and extreme inability to move; and also in thought, extreme retardation of thought, difficulty of thought, and on the other hand, the flight of ideas which goes with the elated mood, the jumping ideas from one point to the other.

Q. The evidence in this case as bearing on White's kind of insanity was that of elated emotion, was it not, the uneasiness and nervousness rather than the retardation?

A. No, I don't think you can ever cut out a part of that mental trouble from the other parts. The variations in mood, of conduct and thought may be extremely sudden and you cannot take one part of it out. You cannot say this man has got a mania and now he has got melancholia; it is all a part and parcel of one psychosis—one trouble.

261 Q. That is true, Doctor, but the thing that attracts attention is either the exhilaration or the elation of mental moods and physical movement, or it is the retardation; those are the things that attract attention?

A. Yes.

Q. And those are the things that attracted attention here—were the uneasiness of White and his elation; not his moroseness that we have during the trial; that did not attract your attention?

A. Well, his weeping attracted my attention in the court room——

Q. When did he weep, Doctor?

A. —which of course might be a compliment to you in your closing address.

Q. Oh, you mean during the argument?

A. During the argument, yes.
Q. You didn't see him weep at any other time?
A. I couldn't say that I had seen him weep at other times.

Doctor GEORGE F. JELLY, an alienist of long standing, testified that he was present with Dr. McDonald in June and saw White at the Worcester Hospital. He was asked,

Q. From your observation of him at that time, from what you have heard in court here, the examination of the testimony, having in mind that the verdict in the Jordan case was rendered on May 4th about noon, what do you say as to whether or not Willis White was insane at the time of rendering his verdict and previous thereto?

A. I think he was insane at the time of rendering the verdict and must have been so from the history previous to that time. I base my opinion upon the fact that he is a very unstable man, subject to periods of elation and depression, boisterous at times, and depressed at times, and from the development of certain delusions about his food and other suspicions—that he said that his food had been tampered with and he said he had not proper care, had not been treated properly—that was his words. I think while deliberating with the jury; that his food was tampered with, that there were things put in it, that he was doped, or some such word as that, which injured his health; and that, then, afterwards, the day after,
262 he said that Jordan was innocent but that they were oblived to convict him. Those expressions and his general history, with the tendency in the family to insanity, with what I saw at the Worcester Hospital, from the history given there, makes me feel that Willis White was insane at the time he rendered the verdict, and he has been insane ever since."

On cross-examination he was asked:

Q. And you would attach more significance, would you not to the delusion of drugged food in this case if it had come from within White's own mind?

A. Well, a delusion to be a delusion must have its origin within. It may be suggested by something outside. Perhaps I don't quite understand you.

Q. I thought I made that plain and we agreed on that, Doctor. That a delusion may spring wholly from within.

A. Yes.

Q. Or it may be caused by some outside suggestion?

A. It may be caused by some outside suggestion, but the mind must be in abnormal condition to receive it and make it a delusion.

Q. Do you attach any significance to the fact that these jurors were jollying White?

A. I think that should be taken into consideration.

Q. And that the first suggestion of drug or dope came from the other jurors?

A. I didn't understand that it did, I didn't understand that it did.

Q. You don't remember Mr. Hurley?

A. No.

Q. When White first spoke of the food hurting him, he didn't say it was drugged, did he?

A. That I can't say positively.

Q. Did that have any effect in your mind in making up your mind that he had a delusion?

A. Why, in this way, it would, that if a man was told that something was put in his food, to jolly him, and he might—if he developed it into a delusion it would have a great effect on my mind in saying that he was not right mentally. As you recall it, I think it was as you say, he spoke first of the food hurting him,
263 and that the dope came later. The food hurting him came from the other jurors.

Q. No, the talk, the suggestion that the food had been drugged or doped, came from other jurors?

A. I don't understand; I don't recollect distinctly that it was so. I have no doubt it was so.

Q. Don't you attach any importance to that fact?

A. The suggestion of the other jurors?

Q. Yes.

A. I should, of course; of course I should.

Q. A delusion to which you would attach great importance in forming your opinion would be one that the patient formed without any cause, wouldn't it,—grow out of his mind?

A. It would be stronger if it came without cause, but it would still be a delusion if the person believed he had been poisoned and all that when it started as you have described. It would still be a delusion; because if you and I or if he had simply a looseness of the bowels and disturbance of his health from food, that would not be a delusion if it was a fact; but if he believed on top of that that it was poison given to him deliberately to hurt him, then that would be a delusion no matter how it came. If a man called a physician who told him he was sick and told him he had been poisoned, he might accept it without it being a delusion. If he believed a thing of that kind without any foundation whatsoever, it would be an insane delusion; but if in the course of conversation you talked to a friend and let him believe that he had had something that was given him that was hurting him, and he believed it, that would not necessarily be an insane delusion. If White had good reason to believe that the other jurors were his friends and they kept telling him in good faith that there was stuff in the food, and he was being up and down nights, that would not be an insane delusion.

(By STEVENS, J.:)

Q. Doctor, are you satisfied his mental condition was such as to affect his ability to intelligently consider the evidence in the case?

A. I do, sir; I do feel so.

Q. Do you think he was insane at the time—are you satis-
264 fied he was insane at the time he was sworn in as a juror?

A. I don't dare to go quite so far as that, your Honor. I think he was an unstable man; not a normal man.

Q. Do you think he ought to have been committed to an insane asylum before the trial?

A. I have no evidence to speak of that. I think he was an abnormal man, an unstable man.

Q. I mean, from the evidence you have heard, are you satisfied he ought to have been committed to an insane asylum before the trial?

A. I would not say that without further evidence.

Mr. PRATT: I have, may it please your Honors, and I offer the original papers in the case of Messenger v. Dennie, action of tort, commenced by writ returnable to the July term, 1881, of the Superior Court, for the County of Suffolk, upon which there was first a disagreement, then a verdict on the 11th day of December, 1881; and I call the court's attention especially to a motion for a new trial made by counsel for the defendant in that case, based upon the affidavit of three physicians—two physicians—who examined a juror Shepard who served on the case and rendered the verdict. The affidavit of Joseph D. Fenwick, which is to the effect that he was the family physician of the juror Shepard, and that on the 10th day of March, 1882, he examined Shepard as to his mental condition, and he also saw him at his home in Chelsea several times previous to March 10, 1882; that upon his examination and all the other evidence available to him, he was of the opinion that Shepard was on the 10th day of March, 1882, and had been for four months prior thereto——

STEVENS, J.: What was the date of this verdict?

Mr. PRATT: I beg pardon.

STEVENS, J.: What was the date of the verdict, I say.

Mr. PRATT: The 11th day of December, 1881. The testimony of the two physicians who examined him, upon whose affidavit he was committed to the asylum at Danvers, states that he was insane four months before their examination

265 Dr. William B. Goldsmith, who was then in charge at Danvers, made affidavit, which was filed in the case that he had examined the juror Shepard; from the examination of him and from his observation and treatment of the patient while he was under his care at the hospital, he was prepared to testify and did testify that in his opinion the juror Shepard was insane upon the 10th day of March, and had been insane for four months prior thereto.

I ought to say to the court that the condition of the juror first came to the attention of counsel making the motion—the moving counsel—in October, of 1882, ten months after the rendering of the verdict, and six months after the examination and commitment.

Then there was filed the certificate of the physicians and the statement of the applicant and the order of Eben Hutchinson, Justice of the Police Court of Chelsea, which are also on file in this case. Counsel in that case made affidavits that they had no knowledge of it until six months after the time of committing.

Then there were allowed to be filed the affidavits of nine of the

members of the panel, who sat with him, and they are of about this tenor—I pick at random the affidavit of Edgar J. Bliss:

"I, Edgar J. Bliss, on oath depose and say that I am a resident of Jamaica Plain; am 40 years old; I am Boston agent for Vermont marble quarries; I was foreman of the jury in the second session of the Superior Court last November and December. I knew Charles H. Shepard of Chelsea and served with him in twelve or thirteen cases. I never saw anything about him that would cause me to doubt but he was of sound mind. I had considerable conversation with him from time to time and there were no traces in his talk of any unsoundness in him. I had occasion to notice of him as I did of other jurymen that they would some times be inattentive to the evidence. I was foreman of the jury that heard the Messenger v. Dennie case and remember talking with Shepard about that case and seeing no unsoundness in him."

As I say, the foreman and eight others, eight of his fellows,
266 made such counter affidavits. Then there were counter affidavits of two sisters and two brothers, and of a number of business acquaintances and friends, all to the same effect. That was heard upon the second day of November——

STEVENS, J.: There was no oral testimony?

Mr. PRATT: No oral testimony (continuing)—1882, before Judge Mason—that was before he was Chief Justice. He wrote no memorandum of opinion accompanying the decision of the motion, but the memorandum is made on the lower left-hand corner: "Motion allowed; new trial ordered." And we offer those.

On behalf of the government, Dr. HOSEA M. QUINBY, superintendent of the Worcester Asylum for many years and an expert alienist testified that on May 8th White was committed and recived at this asylum; was in attendance at Jordan trial; can't say I observed Juror White at any time during the trial; that with an assistant he made a thorough examination of White's physical condition, as well as his mental and nervous condition. It was found that White was suffering from very marked kidney trouble, that his urine was loaded with albumen; that he had some heart complication and evidence of a chronic kidney trouble—Bright's disease. Mental examination of his condition resulted in finding him very much excited, violent and noisy; that he had ideas of poisoning and refused food, and required either hand or mechanical restraint for some days. The diagnosis of this witness and that of his associates at the hospital was that White was suffering from "Manic Depressive Insanity," that is, an alternation of a state of depression and state of excitement. Ill health might produce these symptoms as well as over-excitement; Bright's disease would be a contributing cause, great worry over financial condition might also contribute or be adequate cause, and taking them all in conjunction, Bright's disease, worry over financial matters, and strain and stress of the trial would be adequate cause for the breaking of White's mind in a form of a reac-
267 tion after the trial was over. Such an attack might come on very suddenly or it might be weeks coming on. The name

acute mania suggests that it does in many cases come on very suddenly; it is characteristic of the disease. He testified that there was bearing of importance in the hereditary taint in White's case. In the opinion of this witness White was not a fit subject for commitment to an asylum on the day before he was sworn in as a juror. He was asked:

Q. You heard Doctor Jelly's distinction between insane delusions and delusions that are not insane? I understand that there is a well marked distinction?

A. I think it is.

Q. And what in your opinion, assuming this was a delusion in regard to the drugged food, what sort of a delusion is it in your opinion?

A. I think it is very important in considering this delusion with reference to the man's sanity, to determine at what period he himself accepted it as a delusion and showed by his action that he had so accepted it. That is, a mere statement received or a mere acquiescence in the statement received from a fellow juror that his food was doped, it don't seem to me amounts to a delusion, or to an insane delusion, but when he, on the morning of the 5th, I think, if I remember rightly, stated—elaborated that idea and stated himself that he was poisoned—that his food was poisoned in order to make him decide the case as they wanted it decided, then I think he evidently was insane—positively was insane.

Until that time I did not see any sufficient evidence to regard him as insane; there is a decided distinction between delusions which grow entirely out of the mind of the patient himself, or delusions that are suggested and borne in on the mind by outside influences; I agree with Dr. Jelly that if this delusion came about through the talk of the friendly jurors and he finally believed in it, then it was not an insane delusion; it became so afterwards; the first evidence we have that I remember that it became an insane delusion was on the 5th of May.

This witness testified that when White was first committed
268 to his care he was of the opinion that the attack was an acute one and that White would soon recover, but at the time of testifying on October 9th his condition was very grave and in his opinion he would probably not recover. He was asked on cross-examination.

(By Mr. BARTLETT:)

Q. Have you had many cases where men have become insane, violently insane, and chronically insane over night?

A. Not many, no.

Q. How many have you had of that kind?

A. Oh, I don't think more than two or three.

Q. Outside of violence?

A. I don't think more than two or three that I can remember now.

On cross-examination witness testified that White was suffering from chronic Bright's disease for several years; very few cases of Bright's disease in my opinion or in my experience result in insanity; the fact that he had such a disease in an aggravated form entered into my consideration of the mental disease; the delusions he had were in line of delusions which follow a poisoning of some kind either from a drug or from urea; it had weight in deciding the form of insanity; it had no especial weight in determining that he was insane; in most cases of well developed uric poisoning, the mental condition is affected; I found no uric poisoning in White's case; as I remember the first time that White spoke of delusion was Wednesday morning when he was going to Boston with another juror in another case; he then stated that the food was poor or that the food while he was here was poisoned in order to get him to think as the others wanted him to think; a decided distinction can be made between the statement that the food had been poisoned for some specific purpose and that the food had been tampered with; the fact that he said it had been tampered with doesn't necessarily suggest that he was insane at that time; the testimony that he got off a mile and a half from his home sation making the walk three and one half miles when if he went to the station in the usual and ordinary way, his walk would have been only two miles or
269 perhaps a mile and a half, didn't have any effect on my mind as it didn't seem to be necessarily an insane act; the statements made on Friday have no effect on my opinion as to his condition before that day; the testimony that White called at the jail Tuesday afternoon and acted like a drunken man; that the witness didn't smell liquor upon him, didn't indicate to me that he was necessarily insane; neither did the fact that he "wanted to see John" strike me as remarkable; I didn't know the relations of the men at all; I know various people address each other by their first names, especially those intimate about the courts; that of itself would not have affected my ideas at all; from all the evidence I have been able to gather, in my opinion he was sane on Tuesday, up to the time that he got home; when the delusion became fixed in his own mind, I would say that was evidence of insanity; when he began to elaborate the idea that he had received from the jurymen and then consider it as evidence of poisoning, and thought he had been poisoned for a purpose, then I should consider he was insane.

Q. Well, so far as actually carrying out and acting in view of this testimony here, don't you find on this evidence that he actually carried out the delusion to this extent,—that five or six days he started in and abstained from food, abstained from tea and actually acted under that state of mind, doing the very things—on the evidence here, doing these very things,—how did that affect your mind as to his dealings with this delusion, actually acting under it and carrying it out?

A. I have no evidence that it was on account of the delusion or this idea, if you call it so—this idea—that he did these things. It might have been for some other reason.

Q. You haven't any suggestion from anybody as to what that reason was?

A. No, except that he was—that his digestion had been upset during the trial, and the talk of the other jurors, his peculiarity in regard to the food might not have been on account of this idea at all; it might have been on account of the condition of his digestion.

On redirect examination the witness testified as follows:

270 Q. Assuming that White had an insane delusion that his food was drugged or poisoned, if you please, for a week or ten days even before the verdict, would that fact be inconsistent with his being sane enough to properly consider the evidence, weigh the evidence and arrive at a sound conclusion.

A. I don't think that the mere fact that he had a delusion would necessarily affect his judgment; I wouldn't commit him to an insane asylum from the mere fact that I was of opinion that for a week or ten days before the fourth day of May he had an insane delusion that somebody had drugged his food. The statement of White that the food hurt him because he had been up and down through the night is a reasonable explanation for his not wanting to eat certain foods. If he had no reason to give for his changing food that would be a suspicious circumstance. The fact that you have a good reason does away with most of the suspicion.

Harry A. Clark, witness offered by the Commonwealth, testified as follows: Resident of Maynard about twelve years; have known White for about fifteen years; met White on Tuesday night, May 4, about seven o'clock in South Acton as we got off the train; he asked me how long we would have to wait for the electric car to go to Maynard.

It was agreed by counsel that four trains left Boston for Maynard in the afternoon at 2:14, 5:14, 5:34 and 7:15.

It was about two miles from South Acton to Maynard, and about a mile or a mile and a quarter from Maynard to his home; there was no train that connected with the train that we came up on; I said to him, "You done a good job down there." He didn't make me any answer at all; he turned the subject; he asked about how long we would have to wait for a car; I never had any business dealings with White, but I have known him to speak to him for a good many years; I noticed nothing in his speech, actions or conduct that was different from his normal condition, no more different than what a man would be in a hurry to get home.

271 Dr. Howard Hamblen, a witness offered by the Commonwealth, testified that he was a physician; that he had been a physician since 1900; that he was a graduate of Tufts College, in general practice; have known Willis White seven or eight years; have been family physician since the latter part of 1904 or 1905; have attended the family frequently; only time I ever treated him personally was for blood poisoning in his finger; have seen him when tending other members of the family each year since that time; the

family consisted of the wife, her mother and four children and Mr. White; have attended all of the children during that time; most always saw White; sometimes have seen him at other places; have never noticed anything in his speech, conduct or actions which would denote he wasn't a sane man; it never occurred to me that he was insane; I have seen him carrying school children to school; I think he did that for a couple of years.

On cross-examination witness testified that he didn't pretend to have any special knowledge of the nervous system or to be an alienist or neurologist; I think I have a peculiar knowledge which fits me to give an opinion which will be of assistance to the court; during the time I was his family physician, didn't observe any effects of poison as instanced in his state of mind; he had to go by my house when he went to the village or usually did and I have seen him then.

THOMAS HILLIS, a witness offered by the Commonwealth, testified that he was an attorney at law since 1882; have lived in Maynard all my life; have known Willis A. White fifteen or twenty years; have done business for him and with him, and have seen him frequently; the only other business besides law was to sell him a horse; have never observed anything about him but what he was normal.

ARTHUR J. COUGHLAN, a witness offered by the Commonwealth, testified as follows: I have lived in Maynard twenty-five years; chief of the fire department; have been selectman for seven years previous to March, 1909; knew Willis A. White for ten years; I was chairman of the board of selectmen when the jury list was made up;
272 had bought some small articles from him at auctions and had sold things at auction with him; have seen him more or less frequently in the last few years; have had an opportunity to observe his manner and talk; saw him just before the Jordan trial began, but don't recollect how close to the trial it was; have never observed anything peculiar about his manner, speech or actions that indicated that he was not a normal man.

JOHN CONNORS, a witness offered by the Commonwealth, testified as follows: Have lived in Maynard seven years; am a police officer of the town of Maynard, and have been such for seven years; in the absence of the chairman of the board of selectmen, I am what they call the chief of police; I am also truant officer and have been for about six years; have known Willis A White for a little over six years; have bought vegetables or fowl or the like of that from him; have not observed anything in his speech, conduct or action which indicated he was not a normal man.

S. RAYMOND KITCHEN, a witness offered by the Commonwealth, testified that he was cashier of the American Woolen Company's plant at Maynard; I have been such for eight years; have known Willis A. White probably seven years; had business dealings with him; bought a horse from him; he has sold several for me; has done

some cleaning up around our tenements; was going to do some business for us when he was drawn to serve on the jury; while acting as a juror in the trial I received a letter from him: I had agreed to have him clean up around our tenements of which we have about four hundred, clean up the ashes and the accumulation of the winter refuse; he was to start on this work about the time of the impaneling of the jury; I met him week before he came to Cambridge in front of the Maynard post office; asked me if he could do this work; I found out then he had done it before subject to contract by somebody else; I told him to come around and see me in a few days; I wanted to look into the price; he came to me the following Monday morning,
273 I think it was; I told him he could have the work to do; I think that was the Monday before he came here to serve on the jury; I talked with him then; I told him he could have the work at the price he agreed to do it for; then he leaned his arm on the corner of my desk and told me about a transaction he had recently with another man in which I wasn't very much interested; at that time I didn't observe anything in his speech, conduct or actions that would indicate he was not a normal man.

Witness testified that he had not seen Mr. White more than three or four times during the year previous to the time of the trial.

The following letters were admitted in evidence and the same are hereto annexed and marked "B," "C," "D," and "E":

"Exhibit 19," letter dated East Cambridge, Mass., April 28, 1909, from White to his wife.

"Exhibit 20," letter dated East Cambridge, Mass., April 30, 1909, White to Hamblen.

"Exhibit 21," letter dated East Cambridge, Mass., April 30, 1909, White to his wife.

"Exhibit 22," letter dated East Cambridge, Mass., April, 1909, White to Kitchen.

The letters marked Exhibits 19, 20 and 21 were given during the trial of the juror Willis A. White to the sheriff to mail, but they were not allowed to go out by the sheriff because they referred to the Jordan case and the deliberations of the jury.

With reference to the knowledge of the prisoner and his counsel as to White's mental condition, the following colloquy occurred between his counsel and the court

Mr. PRATT: Now, may it please your Honors, we deem it of importance that it should appear upon the record that neither of the counsel for the prisoner knew of the mental condition of the juror White, until Sunday, the 9th day of May, when two of the junior counsel visited the Bloomingdale Asylum at Worcester and
274 learned from Dr. Quinby that the juror was confined there there and had been committed there as an insane person. The senior counsel knew it from the junior counsel on the following day, Monday, the 10th. We are prepared to make affidavit about it, or if there is no question about it——

STEVENS, J.: We assume, I suppose I may say, that neither of the

counsel for the defence had reason to suppose that the mental condition of the juror was not sound until after the verdict.

Mr. PRATT: Yes, sir. We felt that that should appear of record. My associate suggests that of course that should include the prisoner himself.

STEVENS, J.: Yes.

Mr. PRATT: His first knowledge of that was when it was communicated to him by counsel.

STEVENS, J.: I think we should assume so.

It was admitted by the Commonwealth that juror Willis A. White was insane upon Thursday and Friday following the Tuesday, at noon of which day the verdict was rendered, and continued to be insane thereafter.

The circumstances attending the testimony of the jurors were as follows:

When the time for the hearing upon the question of the new trial approached, the counsel for the defendant addressed a communication to the court stating that they deemed it advisable that the jurors, other than Willis A. White, be called to testify, and requested the court to give such directions or suggestions as the court deemed proper for the guidance of the counsel for the defence. Thereupon the court replied that if any of the jurors were called to testify that all should be called, and they should be put upon the stand without any previous communication with them by anybody.

The jurors were called and testified in accordance with this suggestion of the court.

The foregoing is all of the evidence material to the case.
275 At the conclusion of the testimony the defendant requested the court to rule and find, as is contained in the seventy-two requests for rulings and findings filed herewith and marked "F" and made a part of this bill of exceptions; on the 14th day of November, 1909, the court found and ruled as follows:

"We find by a fair preponderance of all the evidence as a fact that the juror Willis A. White was of sufficient mental capacity during the entire trial of Chester S. Jordan until after the verdict was returned, to intelligently consider the evidence, appreciate the arguments of counsel, the rulings of law, the charge of the court, and to arrive at a rational conclusion, and therefore we deny the motion.

Having found the above fact we deem it unnecessary to consider the requests for rulings.

WILLIAM B. STEVENS,
CHARLES U. BELL,
Justices of the Superior Court."

To the refusal of the court to rule and find as requested in requests numbered one to seventy-two, both inclusive, and each of them, in the requests for rulings and findings heretofore referred to, the defendant seasonably excepted.

The defendant also seasonably excepted to the above finding of the

court and the overruling of the motion for a new trial and alleged his exceptions as follows:

1. To the finding of the court "by fair preponderance of all the evidence as a fact that the juror, Willis A. White, was of sufficient mental capacity during the entire trial of Chester S. Jordan until after the verdict was returned to intelligently consider evidence and appreciate arguments of counsel, rulings of law, the charge of the court, and to arrive at a rational conclusion."

2. To the overruling by the court of the motion for a new trial if made as a matter of discretion—the defendant averring that
276 upon all the evidence taken at the oral hearing upon the motion it appears that said overruling is not in the exercise of the wise discretion of the court, but rather, is it an abuse of it.

3. To the overruling by the court of the motion for a new trial, if made as a matter of law—the defendant averring that upon all of the evidence taken at the hearing upon the motion the defendant is entitled to a new trial, as a matter of law.

4. To the overruling by the court of the motion for a new trial, if made as a matter of law—the defendant averring that the finding made by the court does not disclose any adequate grounds in law for refusing a new trial to the defendant and the court, by refusing to grant a new trial upon the grounds set forth in its finding, has deprived him of the rights guaranteed to him under Article XII. of Part the First of the Constitution of Massachusetts and Article XIV. of the Amendments to the Constitution of the United States.

5. To the overruling by the court of the motion for a new trial—the defendant averring that the finding made by the court does not disclose any adequate grounds in law for refusing a new trial to the defendant and the court, by refusing to grant him a new trial upon the grounds set forth in its finding, has deprived him of the rights guaranteed to him under Article XII. of Part the First of the Constitution of Massachusetts, and Article XIV. of the Amendments to the Constitution of the United States.

6. To the overruling by the court of the motion for a new trial, if made as a matter of discretion,—the defendant averring that upon all the evidence taken at the oral hearing upon the motion, it appears that said overruling is not in the exercise of the wise discretion of the court, but rather it is an abuse of it, and that the court, by so finding and ruling, has deprived him of the rights guaranteed to him under Article XII. of Part the First of the Constitution of Massachusetts, and Article XIV. of the Amendments to the Constitution of the United States.

277 The defendant also seasonably appealed. The appeal is hereto annexed and marked "G."

By the refusal of the court to find and rule as requested, and by the overruling of the motion for a new trial, and the finding of the

court, the defendant is aggrieved and now asks that this, his bill of exceptions, may be allowed.

CHESTER S. JORDAN,
By His Attorneys, CHARLES A. BARTLETT,
HARVEY H. PRATT,
JEREMIAH S. SULLIVAN.

Filed November 16, 1909.

Allowed.

WILLIAM B. STEVENS,
CHARLES U. BELL,
Justices of the Superior Court.

"A."

COMMONWEALTH OF MASSACHUSETTS,
Middlesex, ss:

Superior Court.

COMMONWEALTH
vs.
CHESTER S. JORDAN.

Motion for a New Trial.

Now the defendant personally comes and moves the court that the verdict of the jury in the above entitled cause be set aside and a new trial granted because he says that Willis A. White of Maynard, one of the jurors who rendered said verdict was insane during the trial of the prisoner upon the indictment in the above entitled cause and at the time said verdict was agreed upon and rendered.
278 In verification of which he files herewith the affidavits of Dr. Frank U. Rich of Maynard and Dr. George E. Titcomb of Concord and a copy of the order of John S. Keyes, Esquire, Justice of the District Court of Central Middlesex for the commitment of said White to the State Asylum for the Insane at Worcester.

By His Attorneys, CHARLES W. BARTLETT,
HARVEY H. PRATT,
JEREMIAH S. SULLIVAN.

I, George E. Titcomb of Concord in the County of Middlesex and Commonwealth of Massachusetts, being duly sworn on oath depose and say that I am a practicing physician in and a permanent resident of said Concord; that I am a graduate of a legally chartered medical school and have been in actual practice as a physician since my graduation for more than three years consecutively; that I am registered in accordance with the provisions of Chapter 76 of the Revised Laws, and that I do not hold any office or appointment in

or connected with the State Asylum for the Insane at Worcester. That on the eighth day of May, A. D. 1909 I personally examined with care and diligence one Willis A. White a resident of Maynard and as a result of said examination I found and certified it to be my opinion that he was on said eighth day of May insane and a proper subject for treatment and custody in said asylum for the insane at Worcester; that at the time of said examination I observed that said White presented the symptoms of acute mania; he was violent and talkative and talked disconnectedly in regard to various subjects, and that on said eighth day of May I made affidavit to the above before John S. Keyes, Esquire, Justice of the District Court of Central Middlesex.

Dated this eleventh day of June, A. D. 1909.

GEORGE E. TITCOMB, M. D.

279 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

11TH OF JUNE, 1909.

Personally appeared the above named George E. Titcomb and made oath that the foregoing affidavit by him subscribed is true, before me

HARVEY H. PRATT,
Justice of the Peace.

I, Frank U. Rich, of Maynard in the County of Middlesex and Commonwealth of Massachusetts, being duly sworn on oath depose and say that I am a practicing physician in and a permanent resident of said Maynard; that I am a graduate of a legally chartered medical school and have been in actual practice as a physician for more than three years consecutively since my graduation; that I am registered in accordance with the provisions of Chapter 76 of the Revised Laws and that I do not hold any office or appointment in or connected with the Asylum for the Insane situated at Worcester; that I have known Willis A. White for upwards of twenty years and for a long time up to within a year from the date hereof I was his family physician; that during the time I have known him I have not only treated him and his family but have had business dealings with him, have had opportunity to note his actions and mentality. In my opinion during the time he was sitting as a member of the jury in the trial of the cause of Commonwealth vs. Chester S. Jordan he was insane. I examined him on the eighth day of May personally with care and diligence and as a result of such examination I then found he was a proper subject for treatment and custody in said asylum for the insane under the provisions of law. I found on said eighth day of May that he presented marked symptoms of acute mania, was violent and talkative; he sang songs and recited religious poems and talked disconnectedly in regard to various subjects. I also examined him on the seventh day of May at his home

at the solicitation of his wife and Arthur E. Walker one of
280 the Selectmen of the Town of Maynard. At this examination he appeared irrational, talked disconnectedly, had hallucinations and was violent, and I left him in the custody of a police officer.

To the conditions as I found them on said eighth day May I made oath before John S. Keyes, Esquire, Justice of the District Court of Central Middlesex.

Dated this eleventh day of June, A. D. 1909.

FRANK U. RICH, M. D.

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

11TH OF JUNE, 1909.

Personally appeared the above named Frank U. Rich and made oath that the foregoing affidavit by him subscribed is true, before me

HARVEY H. PRATT,
Justice of the Peace.

(*Order of Commitment of Insane*—1908.)

COMMONWEALTH OF MASSACHUSETTS,
Middlesex, ss:

To the Sheriff of our County of Middlesex, his Deputies, the Constables or Selectmen of Maynard, in said County, and to the Superintendent of the Worcester State Insane Hospital, in Worcester, in the County of Worcester, Greeting:

Whereas, it has been made to appear to me, John S. Keyes, Justice of the District Court of Central Middlesex in the County of Middlesex, after a full hearing in the premises, that Willis A. White now residing in Maynard in said County, is insane, and a proper subject for the treatment and custody of said hospital or asylum, hav-
281 ing been personally seen and examined by me, that there is no doubt about his insanity and that he ought to be committed to said hospital or asylum and that he has a legal settlement in this State; that he has been an inhabitant of this State for the six months immediately preceding this finding; that by reason of insanity he would be dangerous if at large.

Now, therefore, you, the said Sheriff, Deputies, Constables or Police Officers, and each of you, with necessary assistance, and a Selectman are hereby commanded in the name of the Commonwealth of Massachusetts, forthwith to convey the said Willis A. White to the hospital or asylum aforesaid, and to deliver him to the Superintendent thereof, and make due return of a copy of this precept with your doings therein. And you, the said Superintendent, are hereby in like manner commanded to receive the said Willis A. White (who is sent herewith) into your custody in said hospital or asylum, and there safely to keep according to law. Said commit-

ment is made subject to the provisions of Chapter 87, Section 34, of the Revised Laws, and the custody therein contemplated in case of transfer is hereby authorized.

Witness my hand at Concord aforesaid, this eighth day of May in the year of our Lord one thousand nine hundred and nine.

JOHN S. KEYES,
Justice of said Court.

A true copy.
Attest:
EDWARD L. LOUGHLIN,
Clerk of said Court.

COMMONWEALTH OF MASSACHUSETTS, *ss:*

MAY 8, 1909.

In obedience to the foregoing order of commitment, I have this day conveyed the within-named insane person to the within-named institution for the insane, and have delivered said insane
282 person to the Superintendent thereof, together with the order of commitment and a copy of the physician's certificate and of the application for commitment.

JOHN CONNORS,
Police Officer of Maynard.

Services	.30
Copy	.25
Travel .....miles,	...
Carriage .....hours,	...
Railroad fare	...
Aid	...

I certify that the extra charge on the warrant, of which this is a copy, was actually and necessarily incurred and disbursed, and is reasonable.

A true copy.
Attest:
JOHN CONNORS.

—— ——, *ss:*

Subscribed and sworn to before me.

——— ———,
Justice of the Peace.

(*Application for Commitment of Insane*—1908.)

COMMONWEALTH OF MASSACHUSETTS,
Middlesex, ss:

To the Honorable John S. Keyes, Justice of the District Court of Central Middlesex, in the County of Middlesex:

The subscriber, Arthur E. Walker of Maynard, in the County of Middlesex respectfully represents that Willis A. White residing in

Maynard, in the County of Middlesex is insane and a proper subject for treatment and custody in an insane hospital; and, therefore, prays that said Willis A. White may be committed to the Worcester Insane Hospital; and, as required by section 39 of chapter 87 of the Revised Laws, as amended by chapter 436 of the Acts of 1905, makes the following statement relative to the patient:

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1. 1. Sex, Male; age 54 years; birthplace of patient, Maine.
2. of mother, Maine; of father, Maine. If patient
3. is foreign born how long in United States,—; how long a resident of Massachusetts
4. 30 years; color, white; occupation, Farmer; single,
5. married, widowed, divorced,—married.
6. 2. Number of previous attacks,—none; present attack began May 4th, 1909;
7. (If the patient has ever been an inmate of an institution for the insane, state when, where, and for what
8. length of time, and whether discharged, recovered or otherwise.) .....
9. .....
10. 3. Was the present attack gradual or sudden in its onset? Sudden.
11. 4. What was the bodily condition of the patient. Good.
12. 5. Has the patient been physically injured? If so, when, and to what extent?
13. .....
14. 6. Is the patient subject to epilepsy? No.
15. 7. Is the patient cleanly in dress and personal habits? Yes.
16. 8. Is the patient paralytic, violent, dangerous, destructive, excited, depressed, homicidal or suicidal?
17. (If homicide or suicide has been attempted or threatened, it should be so stated.) .....
18. Excited.
19. 9. What is the cause of the patient's insanity? (State both the predisposing and exciting causes.)
20. Do not know.

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21. .....
"22. 10. Has or had the patient insane relatives, and if so, state the degree of consanguinity, and whether
23. paternal or maternal? Yes, grandfather (paternal) and brother.
24. .....
25. 11. What are the patient's habits as to the use of liquor, tobacco, opium, chloral or other narcotic?
26. Uses a very little liquor.

If a woman:—

Has she ever born- children? How long since the birth of her last child?
13. Maiden name of mother, name of father,
Last known address of patient, Maynard, Mass.
Name and post-office address of guardian and nearest relatives or friends,
Clara B. White, wife. Harold White—son.
Alton W. White,—son. Ruth White,—daughter
Everett S. White,—son.
14. Does the patient, husband, either parent or any child of the patient own real estate in Massachusetts?
No. If so, who, and in what city or town?

Has the patient, husband or either parent resided in any place in this State five years continuously
since 1860, and paid three taxes within said five years?
YES. If so, who, when, and in what city or town?
Maynard.

Was the patient or husband in the military or naval service of the United States during the Civil or

285

Spanish war? NO. If so, in what regiment and company or vessel?—

Do you desire the patient treated according to homeopathic principles of medicine? NO.
The applicant is unable to answer the above questions..... more fully.
ARTHUR E. WALKER, *Applicant.*
Subscribed and sworn to before me this eighth day of May, 1909.

JOHN S. KEYES,
Justice of the said Court.

A true copy.
Attest
EDWARD L. LOUGHLIN,
Clerk of the said Court.

(*Medical Certificate of Insanity*—1908.)

Commonwealth of Massachusetts,)
County of Middlesex,)ss.
Town of Concord
We, F. U. Rich a permanent resident of
Maynard, County of Middlesex and Commonwealth of Massachusetts, and
George E. Titcomb a permanent resident of Concord,
County of Middlesex, and Commonwealth aforesaid, being

severally and duly sworn, do make oath
53 and depose, each for himself, with the exceptions hereinafter noted, as follows:—
54 1. That I am a graduate of a legally chartered medical school or college; that I have been in actual
55 practice as a physician for three years since graduation and next preceding said oath; that I am
56 registered in accordance with the provisions of chapter seventy-six of the Revised Laws; and that I do
286
57 not hold any office or appointment in or connected with the institution for the insane to which this
58 commitment is to be made.
59 2. That within five days prior to my signing this certificate, namely, on the eighth
60 day of May, A. D. 1909, I, the subscriber, personally examined with care and diligence
61 Willis A. White, a resident of Maynard
62 County of Middlesex and Commonwealth of Massachusetts,
63 and as a result of such examination find, and hereby certify, that in my opinion he is insane and a
64 proper subject for treatment and custody in some hospital, asylum or other institution for the insane,
65 as an insane person, under the provisions of law.
66 3. That I have formed the above opinion from,
67 a. Facts indicating insanity; personally observed by me:
68
69 He presents marked symptoms of
70 acute mania, violent and talkative
71 (b) Reported by others that he is and
72 has been violent, and was put
73 under restraint. Sang songs and recited
74 religious poems. Talked
75 disconnectedly in regard to various
76 subjects
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84
85 The patient did (Here state what the patient did in the presence of each examiner separately,
86 unless it was done in the presence of both.
87
88

The patient's appearance and manner were

b. Other facts indicating insanity, including those communicated to me by others:—(State whether there has been any change in the patient's mental condition and bodily health, and if so, what.)

4. That the above statements are true, to the best of my knowledge, information and belief.

F. U. RICH, M. D.
GEORGE E. TITCOMB, M. D.

Subscribed and sworn to before me this eighth day of May, 1909.

JOHN S. KEYES
Justice of the District Court of Central Middlesex.

A true copy.
Attest:
EDWARD L. LOUGHLIN,
Clerk of the said Court.

288 "B"

EAST CAMBRIDGE, MASS., *April 28th*, 1909.

DEAR CLARA: Will you Please Send me My Bleeding Phlem which you will Find on the upper shelf in the sink Room: As I want it to Explain to my Brother Jouryors when the time comes For us to Discuss the Points of Blood spurting I well know you will Not Lisp to any one about this Letter or the sending of the Phelm: what I wish to convey is I want it to help me explain to my Brother Jouryors the Reasons why I have come to my opinion about the case. I have not shut my eyes since before 3 this morning my Bodly Health never was better. Please put $3.00 in a Little Box with the Phelm but do not allow one of the children or any one else to know what the Box Contains and take it yourself to Maynard & give it to the expess man & Have some 1. cent stamps put on the edges of the Box so any one wont Dare to onpen it untill it gets here to the Officer's. We Are not allowed to speek to any one out side of our selfs. What Bothered me By times in the winter Does not at all now. Is not that a Blessing Good By Girly Please send Me Box at once for I

don't know what minute we will be called up on to begin our Finnel Duties.

From your

WILLIS.

Hide this letter.

"C."

EAST CAMBRIDGE, MASS., *April* 30, 1909.

Friend Hamlin.

DEAR SIR: Will you Kindly Send Me The Points of Tempture of a Person in Perfect Health to One at the Point of Death.
289 What want to find out How High you ever knew it in your Experence to Run just before Death and the Points between
Please Dr you under stand I am under oth. and what ever I rec'd From you to be keep by you as the Same.

That you May under stand me more fully it seem very absurd sum statements Made by an Expert on the Stand yesterday and I am getting it so I can Form my opinion on other statements

Please Burn this Letter as soon as contents are Noted

W. A. WHITE,
East Cambridge Mass

"D."

Sheet 1

EAST CAMBRIDGE, MASS., *April* 30, 1909.

DEAR CLARA. We Have an Extra our given us to day so I will put in Part of the time writting to you I Hope with all my Heart that you are not sick It must be Terrible Hard for you with the Care of the Place and the Milk Route say Nothing of an Extra hired Man Please Clara get a Girl or woman without it will make me sick.

I am getting more Training in Maners & how to appear in getting around in the Public & every thing that Pertains to it Then I ever Rec'd in my Live: After Permishion from me by Mr. Everleth one of the ofices about the Triming of my mustach I Had it done under his Direction and you would not no me with my white shurt & Dicky & (Tall Hat) joke Stif Hat & cuffs & ect adding all the sprucing up Training I rec'd Every Day though the Kindness of The offices. Has Alton got the Dressing all harrowed it will be Nice this Rain will be splendid Tell him if He should take some bursh about 2 or 3 inches & Nail on or spike on a stick of or Plank or joist about a foot apart & spike that Right a cross the Front of the smoother that is the one out Back of the Barn & Hitch the
290 Horses on that then he can stand on the smother & do Double work the Longer the trees the better that smother will crush up the Lumps & the Brush will shake it around and fine it up (It must be very Backwood)

I intend to begin writting up on my owne Hook about the case what Kind of a show will I stand when I compair my Note with the other Eleven Brother Jourys

Please Burn this whole Business when Recd. If it is a Nice day will have our Pictures taken tomorrow They will cost about 1.25 to 1.50 each Can we afford 2: 1. to send down to Elijah. Thought No. 2.

I don't know where I Let of in my Litter which I Let in the other side of the Court Rooms but can Match them up some way. Will try & give you a Little out Line of our Rotine though the Day: we Have a Large Room with 12 Beds so each one has a bed wich is clean & Nice 3 offecers sleep Right off of Room where we sleep we can go to Bed most any time we Like Most all are in bed by 9 o'clock, but simetimes it is Later: we have Plenty of suplys as to keep ourself Neat & clean and a Real old fachened Boarding House with any thing we wish to Eat or use in any way shape or manner and I am so taken up with this trial I dont get time to think of what a Hard time I you are haveing there at Home If there is any Troble in any way Please Clara Dont Keep it From me for I know I can in some way or Ruther get Mr. Whitman by Permishion of the Court come & see you. We had an hour Extra this Noon and was called for about 15 minutes or so & we have been Excusted (excused) for I dont Know How Long. Money will do Lots but there was an old Gentleman on the stand this Fournoon that all the money in the *universe* would not shake I dont *belive*.

Now I sent all of my things Home that I don't Kneed. Will get my washing & collars Done up here Now if you are not able just as well as not to go to Maynard you can put the Phelm in a
291 Little Box in some Batten so it wont shake & put the stamps on the cover or where the top shets down on the Bottom of the Box. I well know you must be sick or in Trouble or I should here from you. Cheer up Girly: It must be very Backwood we Have been called & Retired was called for about 35 to 40 Minutes Spoke to Mr. Whitman just Now about a check for all it is coming to Me & send in the Morning

Good By with Love to all

Kiss Little Ruth & Harold for me I Know there is no Kneed of me to as* any of you to be or do well while I am away but I do ask you all Not to work to Hard

From your loving Husband and Father.

*(ask)

"E."

East Cambridge Mass *April* 1909.

Mr. Kitchen Agent of the American Wooling Co. Maynard, Mass.

Dear Sir. Having been choosen on a case as jouryman which will keep me until after May 1 will be unable to do the job of Clearing up the ashes for you as soon as we Talked of. So if it Will please you to Let the job to Some one else you are at Liberty to do so. But if you wish me to attend to it as soon as though here will write to my Son who is at home & Have him Remove what ashes there are on Parker Street from Mr. Lowes, Mr. Willcoxses, Mr. Perrys, Mr. Morses, and Mr. Smith as menny more as he can before

the first of May So they will have a chanse to clean up a Little which will Keep them out of your Hair. Please Let me know your Decision as soon as convenient.

W. A. WHITE

292 "F."

COMMONWEALTH OF MASSACHUSETTS,
Middlesex, ss:

Superior Court, Criminal Sitting.

COMMONWEALTH, by Indictment,
vs.
CHESTER S. JORDAN.

Requests for Rulings and Findings at the Hearing on the Motion for a New Trial.

And now comes the defendant and asks the court in the hearing upon his motion for a new trial to rule and find as follows:—

1. That upon all the evidence as a matter of law, the defendant is entitled to a new trial.

2. That it is not incumbent as a matter of law upon the defendant to satisfy the court by a fair preponderance of the evidence or beyond a reasonable doubt that the juror White was not of sufficient mental capacity during the late trial of the Commonwealth against the defendant in order to entitle the defendant to a new trial, but if the evidence creates a reasonable doubt in the mind of the court as to whether the juror White was at any time during the introduction of evidence or the deliberations of the jury at the trial of the Commonwealth against the defendant of not sufficient mental capacity to enable him to perform his duties intelligently, then as a matter of law, the defendant is entitled to a new trial.

3. That it is not incumbent as a matter of law, upon the defendant to satisfy the court by a fair preponderance of the evidence or beyond a reasonable doubt that the juror White was not of sufficient mental capacity during the late trial of the Commonwealth against the defendant in order to entitle the defendant to a new trial, but if the evidence creates a reasonable doubt in the mind of the court as to whether the juror White was at any time during the introduction of evidence or the deliberations of the jury at the trial of the
293 Commonwealth against the defendant of not sufficient mental capacity to enable him to perform his duties intelligently, then as a matter of law, the defendant is entitled to a new trial if the court finds that the incompetency of the juror White was not known to the defendant or his counsel or any of them before or during the trial and was only known to them after the verdict.

4. That it is not incumbent as a matter of law upon the defendant to satisfy the court by a fair preponderance of the evidence or beyond a reasonable doubt that the juror White was not of sufficient

mental capacity during the late trial of the Commonwealth against the defendant in order to entitle the defendant to a new trial, but if the evidence creates a reasonable doubt in the mind of the court as to whether the juror White was throughout the entire trial of the Commonwealth against the defendant of not sufficient mental capacity to enable him to perform his duties intelligently, then as a matter of law, the defendant is entitled to a new trial.

5. That it is not incumbent as a matter of law upon the defendant to satisfy the court by a fair preponderance of the evidence or beyond a reasonable doubt that the juror White was not of sufficient mental capacity during the late trial of the Commonwealth against the defendant in order to entitle the defendant to a new trial, but if the evidence creates a reasonable doubt in the mind of the court as to whether the juror White was throughout the entire trial of the Commonwealth against the defendant of not sufficient mental capacity to enable him to perform his duties intelligently, then as a matter of law, the defendant is entitled to a new trial if the court finds that the incompetency of the juror White was not known to the defendant or his counsel or any of them before or during the trial and was only known to them after the verdict.

6. When the question of the insanity or lack of mental capacity of a juror during the trial of a capital case is raised by the defendant by sufficient evidence at a hearing on a motion for a new
294 trial for that cause, the defendant is entitled as a matter of law to a new trial, unless the Commonwealth establishes beyond a reasonable doubt the sanity or mental capacity during the trial.

7. When in a hearing on a motion for a new trial because of the alleged insanity or lack of mental capacity of a juror during the trial in a capital case there is a conflict of evidence as to whether the juror was on the one hand sane or of sufficient mental capacity to perform his duties intelligently during the entire trial, or on the other hand insane or of not sufficient mental capacity to enable him to perform his duties intelligently either during the whole or any part of the trial, as a matter of law, the burden of proof is upon the Commonwealth to establish beyond a reasonable doubt that the juror was sane or of sufficient mental capacity to enable him to perform his duties intelligently during the entire trial, including the investigation of the cause in court and the deliberations of the jury upon their verdict up to and including the time of the rendering of said verdict, and if the Commonwealth does not sustain this burden of proof, the defendant as a matter of law is entitled to a new trial.

8. If the court finds as a fact that the juror White was insane or was not in such a state of mental capacity as to enable him to perform his duties intelligently throughout the entire trial of the Commonwealth against the defendant, then as a matter of law the defendant is entitled to a new trial, as he has been deprived of the rights guaranteed to him under Article XII of Part the First of the Constitution of the Commonwealth of Massachusetts and Article XIV of the Amendments to the Constitution of the United States.

if the court finds that the incompetency of the juror White was not known to the defendant or his counsel or any of them before or during the trial and was not known to them until after the verdict.

9. If the court finds as a fact that the juror White was insane or was not in such a state of mental capacity as to enable him to perform his duties intelligently throughout the entire trial of
295 the Commonwealth against the defendant, and that said mental incapacity was not known to the defendant or his counsel prior to or during the trial, then as a matter of law the defendant is entitled to a new trial, as he has been deprived of the rights guaranteed to him under Article XII of Part the First of the Constitution of the Commonwealth of Massachusetts and Article XIV of the Amendments to the Constitution of the United States.

10. If the court finds that the defendant, the defendant's counsel or any of them knew that the juror White was insane or not in a sufficient state of mental health to enable him to perform the duties of a juror intelligently and this was known to them or either of them prior to the trial of the Commonwealth against the defendant or during said trial, such finding is not sufficient as a matter of law to warrant the court in refusing to grant a new trial for the defendant, if the court is satisfied upon all the evidence that a new trial should otherwise be granted, as in a capital case the defendant as a matter of law cannot be held to waive a disqualification of the above character, of any juror, under the provisions of Article XII of Part the First of the Constitution of the Commonwealth of Massachusetts, and Article XIV of the Amendments to the Constitution of the United States.

11. If the juror in a capital case is at any time during the introduction of evidence or the deliberations of the jury incapacitated by mental disease for the just performance of his duties and his incompetency is not known to the parties or the court before or during the trial, a new trial must as a matter of law be granted to the defendant upon his motion for a new trial on said ground, as he has been deprived of his rights under Article XII, of Part the First of the Constitution of the Commonwealth of Massachusetts, and Article XIV of the Amendments to the Constitution of the United States.

12. Upon all the evidence in the case the juror White by a fair preponderance of the evidence was incapacitated by mental
296 disease for the just performance of his duties during the entire trial of the Commonwealth against the defendant.

13. If the court finds as a fact in accordance with request 12, then as a matter of law the defendant is entitled to a new trial as he has been deprived of his rights under Article XII of Part the First of the Constitution of the Commonwealth of Massachusetts, and Article XIV of the Amendments to the Constitution of the United States.

14. If the court finds as a fact in accordance with request No. 12, and in addition finds that the incompetency of the juror White was not known to the defendant or his counsel or any of them before or during the trial, and was only known to them after the verdict, then as matter of law, the defendant is entitled to a new trial, as he has been deprived of his rights under Article XII of Part the First of the

Constitution of the Commonwealth of Massachusetts, and Article XIV of the Amendments to the Constitution of the United States.

15. Upon all the evidence, by a fair preponderence of the evidence, the juror White was incapacitated by mental disease for the just performance of his duties during the deliberations of the jury upon their verdict at the trial of the Commonwealth against the defendant.

16. If the court finds as a fact in accordance with request No. 15, then as a matter of law, the defendant is entitled to a new trial as he has been deprived of his rights under Article XII of Part the First of the Constitution of the Commonwealth of Massachusetts, and Article XIV of the Amendments to the Constitution of the United States.

17. If the court finds as a fact in accordance with request No. 15, and in addition finds that the incompetency of the juror White was not known to the defendant or his counsel or any of them before or during the trial and was only known to them after the verdict, then as a matter of law, the defendant is entitled to a new trial as he has been deprived of his rights under Article XII of Part the First of the Constitution of the Commonwealth of Massachusetts, and Article XIV of the Amendments to the Constitution of the United States.

297 18. Upon all the evidence, by a fair preponderance of the evidence, the juror White was incapacitated by mental disease for the just performance of his duties during a part of the deliberations of the jury upon their verdict.

19. If the court finds as a fact in accordance with request No. 18, then as a matter of law, the defendant is entitled to a new trial as he has been deprived of his rights under Article XII of Part the First of the Constitution of the Commonwealth of Massachusetts, and Article XIV of the Amendments to the Constitution of the United States.

20. If the court finds as a fact in accordance with request No. 18, and in addition finds that the incompetency of the juror White was not known to the defendant or his counsel or any of them before or during the trial and was only known to them after the verdict, then as a matter of law, the defendant is entitled to a new trial, as he has been deprived of his rights under Article XII of Part the First of the Constitution of the Commonwealth of Massachusetts, and Article XIV of the Amendments to the Constitution of the United States.

21. Upon all the evidence in the case, by a fair preponderance of the evidence, the juror White was incapacitated by mental disease for the just performance of his duties at the time that the verdict was rendered by the jury at the trial of the Commonwealth against the defendant.

22. If the court finds as a fact in accordance with request No. 21, then as a matter of law the defendant is entitled to a new trial as he has been deprived of his rights under Article XII of Part the First of the Constitution of the Commonwealth of Massachusetts, and Article XIV of the Amendments to the Constitution of the United States.

23. If the court finds as a fact in accordance with request No. 21, and in addition finds that the incompetency of the juror White was not known to the defendant or his counsel or any of them before or during the trial and was only know to them after the verdict, then as

a matter of law, the defendant is entitled to a new trial as he
298 has been deprived of his rights under Article XII of Part the First of the Constitution of the Commonwealth of Massachusetts, and Article XIV of the Amendments to the Constitution of the United States.

24. Upon all the evidence, by a fair preponderance of the evidence, the juror White was incapacitated by mental disease for the just performance of his duties during the introduction of evidence, the arguments and charge of the court at the trial of the Commonwealth against the defendant.

25. If the court finds as a fact in accordance with request No. 24, then as a matter of law the defendant is entitled to a new trial as he has been deprived of his rights under Article XII of Part the First of the Constitution of the Commonwealth of Massachusetts and Article XIV of the Amendments to the Constitution of the United States.

26. If the court finds as a fact in accordance with request No. 24, and in addition finds that the incompetency of the juror White was not known to the defendant or his counsel or any of them before or during the trial and was only known to them after the verdict, then as a matter of law the defendant is entitled to a new trial, as he has been deprived of his rights under Article XII of Part the First of the Constitution of the Commonwealth of Massachusetts, and Article XIV of the Amendments to the Constitution of the United States.

27. Upon all the evidence, by a fair preponderance of the evidence, the juror White was incapacitated by mental disease for the just performance of his duties during a part of the time that evidence was being introduced, the arguments were being made and the charge of the court was being given in the trial of the Commonwealth against the defendant.

28. If the court finds as a fact in accordance with request No. 27, then as a matter of law the defendant is entitled to a new trial as he has been deprived of his rights under Article XII of Part the First
of the Constitution of the Commonwealth of Massachusetts
299 and Article XIV of the Amendments to the Constitution of the United States.

29. If the court finds as a fact in accordance with request No. 27, and in addition finds that the incompetency of the juror White was not known to the defendant or his counsel or any of them before or during the trial and was only known to them after the verdict, then as a matter of law, the defendant is entitled to a new trial, as he has been deprived of his rights under Article XII of Part the First of the Constitution of the Commonwealth of Massachusetts and Article XIV of the Amendments to the Constitution of the United States.

30. If the court finds that the defendant is otherwise entitled to a new trial, it is immaterial as a matter of law in a capital case whether the verdict rendered was proper or improper, as the defendant is prejudiced by the mere sitting upon the jury of a man mentally incapable of the just performance of his duties.

31. It is not necessary as a matter of law in the hearing on a motion for a new trial in a capital case for the defendant to establish any of the facts, if any, to be established by him, beyond a reasonable

doubt, but it is sufficient if they are established by a fair preponderance of the evidence.

32. If the court is divided upon any question of fact, the court must as a matter of law find the fact in question in accordance with the finding of the judge that is more favorable to the defendant.

33. If the court is divided upon any question of law, the court must as a matter of law rule upon that question favorably to the defendant.

34. If the court is divided upon any question of law, the court must rule in accordance with the ruling of the judge that is the more favorable to the defendant.

35. Upon all the evidence in the case there is a reasonable doubt whether the juror White was incapacitated by mental disease
300 for the just performance of his duties during the entire trial of the Commonwealth against the defendant.

36. If the court finds as a fact in accordance with request No. 35, then as a matter of law the defendant is entitled to a new trial as he has been deprived of his rights under Article XII of Part the First of the Constitution of the Commonwealth of Massachusetts, and Article XIV of the Amendments to the Constitution of the United States.

37. If the court finds as a fact in accordance with request No. 35, and in addition finds that the incompetency of the juror White, if any, was not known to the defendant or his counsel or any of them before or during the trial, and was only known to them after the verdict, then as a matter of law, the defendant is entitled to a new trial, as he has been deprived of his rights under Article XII of Part the First of the Constitution of the Commonwealth of Massachusetts, and Article XIV of the Amendments to the Constitution of the United States.

38. Upon all he evidence there is a reasonable doubt whether the juror White was incapacitated by mental disease for the just performance of his duties during the deliberations of the jury upon their verdict at the trial of the Commonwealth against the defendant.

39. If the court finds as a fact in accordance with request No. 38, then as a matter of law the defendant is entitled to a new trial as he has been deprived of his rights under Article XII of Part the First of the Constitution of the Commonwealth of Massachusetts, and Article XIV of the Amendments to the Constitution of the United States.

40. If the court finds as a fact in accordance with request No. 38, and in addition finds that the incompetency of the juror White, if any, was not known to the defendant or his counsel or any of them before or during the trial and was only known to them after the verdict, then as a matter of law, the defendant is entitled to a new trial as he has been deprived of his rights under Article XII of Part the First of the Constitution of the Commonwealth of Massachusetts, and Article XIV of the Amendments to the Constitution of the United States.

301 41. Upon all the evidence there is a reasonable doubt as to whether the juror White was incapacitated by mental disease for the just performance of his duties during a part of the deliberations of the jury upon their verdict.

42. If the court finds as a fact in accordance with request No. 41, then as a matter of law the defendant is entitled to a new trial as he has been deprived of his rights under Article XII of Part the First of the Constitution of the Commonwealth of Massachusetts, and Article XIV of the Amendments to the Constitution of the United States.

43. If the court finds as a fact in accordance with request No. 41, and in addition finds that the incompetency of the juror White, if any, was not known to the defendant or his counsel or any of them before or during the trial and was only known to them after the verdict, then as a matter of law the defendant is entitled to a new trial, as he has been deprived of his rights under Article XII of Part the First of the Constitution of the Commonwealth of Massachusetts, and Article XIV of the Amendments to the Constitution of the United States.

44. Upon all the evidence in the case there is a reasonable doubt whether the juror White was incapacitated by mental disease for the just performance of his duties at the time that the verdict was rendered by the jury at the trial of the Commonwealth against the defendant.

45. If the court finds as a fact in accordance with request No. 44, then as a matter of law the defendant is entitled to a new trial as he has been deprived of his rights under Article XII of Part the First of the Constitution of the Commonwealth of Massachusetts, and Article XIV of the Amendments to the Constitution of the United States.

46. If the court finds as a fact in accordance with request No. 44, and in addition finds that the incompetency of the juror White, if any, was not known to the defendant or his counsel or any of them before or during the trial and was only known to them after the verdict, then as a matter of law, the defendant is entitled to a new trial as he has been deprived of his rights under Article XII of
302 Part the First of the Constitution of the Commonwealth of Massachusetts, and Article XIV of the Amendments to the Constitution of the United States.

47. Upon all the evidence there is a reasonable doubt as to whether the juror White was incapacitated by mental disease for the just performance of his duties during the introduction of evidence, the arguments and charge of the court at the trial of the Commonwealth against the defendant.

48. If the court finds as a fact in accordance with request No. 47, then as a matter of law the defendant is entitled to a new trial as he has been deprived of his rights under Article XII of Part the First of the Constitution of the Commonwealth of Massachusetts and Article XIV of the Amendments to the Constitution of the United States.

49. If the court finds as a fact in accordance with request No. 47, and in addition finds that the incompetency of the juror White, if any, was not known to the defendant or his counsel or any of them before or during the trial and was only known to them after the verdict, then as a matter of law the defendant is entitled to a new trial, as he has been deprived of his rights under Article XII of Part the First of the Constitution of the Commonwealth of Massa-

chusetts, and Article XIV of the Amendments to the Constitution of the United States.

50. Upon all the evidence there is a reasonable doubt whether the juror White was incapacitated by mental disease for the just performance of his duties during a part of the time that evidence was being introduced, the arguments were being made and the charge of the court was being given at the trial of the Commonwealth against the defendant.

51. If the court finds as a fact in accordance with request No. 50, then as a matter of law the defendant is entitled to a new trial as he has been deprived of his rights under Article XII of Part the First of the Constitution of the Commonwealth of Massachusetts and Article XIV of the Amendments to the Constitution of the United States.

52. If the court finds as a fact in accordance with request
303 No. 50, and in addition finds that the incompetency of the juror White, if any, was not known to the defendant or his counsel or any of them before or during the trial and was only known to them after the verdict, then as a matter of law, the defendant is entitled to a new trial, as he has been deprived of his rights under Article XII of Part the First of the Constitution of the Commonwealth of Massachusetts and Article XIV of the Amendments to the Constitution of the United States.

53. Upon all the evidence in the case, it is not proved beyond a reasonable doubt that the juror White was mentally capable of justly performing his duties during the entire trial of the Commonwealth against the defendant.

54. If the court finds as a fact in accordance with request No. 53, then as a matter of law the defendant is entitled to a new trial as he has been deprived of his rights under Article XII of Part the First of the Constitution of the Commonwealth of Massachusetts, and Article XIV of the Amendments to the Constitution of the United States.

55. If the court finds as a fact in accordance with request No. 53, and in addition finds that the incompetency of the juror White, if any, was not known to the defendant or his counsel or any of them before or during the trial, and was only known to them after the verdict, then as a matter of law, the defendant is entitled to a new trial, as he has been deprived of his rights under Article XII of Part the First of the Constitution of the Commonwealth of Massachusetts, and Article XIV of the Amendments to the Constitution of the United States.

56. Upon all the evidence, it is not proved beyond a reasonable doubt that the juror White was mentally capable of justly performing his duties during the deliberations of the jury upon their verdict at the trial of the Commonwealth against the defendant.

57. If the court finds as a fact in accordance with request No. 56, then as a matter of law, the defendant is entitled to a new trial as he has been deprived of his rights under Article XII of Part the First of the Constitution of the Commonwealth of Massachusetts,
304 and Article XIV of the Amendments to the Constitution of the United States.

58. If the court finds as a fact in accordance with request No. 56,

and in addition finds that the incompetency of the juror White, if any, was not known to the defendant or his counsel or any of them before or during the trial and was only known to them after the verdict, then as a matter of law, the defendant is entitled to a new trial as he has been deprived of his rights under Article XII of Part the First of the Constitution of the Commonwealth of Massachusetts, and Article XIV of the Amendments to the Constitution of the United States.

59. Upon all the evidence it is not proved beyond a reasonable doubt that the juror White was mentally capable of justly performing his duties during a part of the deliberations of the jury upon their verdict.

60. If the court finds as a fact in accordance with request No. 59, then as a matter of law the defendant is entitled to a new trial as he has been deprived of his rights under Article XII of Part the First of the Constitution of the Commonwealth of Massachusetts, and Article XIV of the Amendments to the Constitution of the United States.

61. If the court finds as a fact in accordance with request No. 59, and in addition finds that the incompetency of the juror White, if any, was not known to the defendant or his counsel or any of them before or during the trial and was only known to them after the verdict, then as a matter of law the defendant is entitled to a new trial, as he has been deprived of his rights under Article XII of Part the First of the Constitution of the Commonwealth of Massachusetts, and Article XIV of the Amendments to the Constitution of the United States.

62. Upon all the evidence in the case, it is not proved beyond a reasonable doubt that the juror White was mentally capable of justly performing his duties at the time that the verdict was rendered by the jury at the trial of the Commonwealth against the defendant.

63. If the court finds as a fact in accordance with request
305 No. 62, then as a matter of law the defendant is entitled to a new trial as he has been deprived of his rights under Article XII of Part the First of the Constitution of the Commonwealth of Massachusetts, and Article XIV of the Amendments to the Constitution of the United States.

64. If the court finds as a fact in accordance with request No. 62, and in addition finds that the incompetency of the juror White, if any, was not known to the defendant or his counsel or any of them before or during the trial and was only known to them after the verdict, then as a matter of law, the defendant is entitled to a new trial as he has been deprived of his rights under Article XII of Part the First of the Constitution of the Commonwealth of Massachusetts, and Article XIV of the Amendments to the Constitution of the United States.

65. Upon all the evidence it is not proved beyond a reasonable doubt that the juror White was mentally capable of justly performing his duties during the introduction of evidence, the arguments and charge of the court at the trial of the Commonwealth against the defendant.

66. If the court finds as a fact in accordance with request No. 65,

then as a matter of law the defendant is entitled to a new trial as he has been deprived of his rights under Article XII of Part the First of the Constitution of the Commonwealth of Massachusetts and Article XIV of the Amendments to the Constitution of the United States.

67. If the court finds as a fact in accordance with request No. 65, and in addition finds that the incompetency of the juror White, if any, was not known to the defendant or his counsel or any of them before or during the trial and was only known to them after the verdict, then as a matter of law, the defendant is entitled to a new trial, as he has been deprived of his rights under Article XII of Part the First of the Constitution of the Commonwealth of Massachusetts, and Article XIV of the Amendments to the Constitution of the United States.

68. Upon all the evidence it is not proved beyond a reasonable doubt that the Juror White was mentally capable of justly
306 performing his duties during a part of the time that evidence was being introduced, the arguments were being made and the charge of the court was being given at the trial of the Commonwealth against the defendant.

69. If the court finds as a fact in accordance with request 68, then as a matter of law the defendant is entitled to a new trial as he has been deprived of his rights under Article XII of Part the First of the Constitution of the Commonwealth of Massachusetts and Article XIV of the Amendments to the Constitution of the United States.

70. If the court finds as a fact in accordance with request 68, and in addition finds that the incompetency of the juror White, if any, was not known to the defendant or his counsel or any of them before or during the trial and was only known to them after the verdict, then as a matter of law, the defendant is entitled to a new trial, as he has been deprived of his rights under Article XII of Part the First of the Constitution of the Commonwealth of Massachusetts and Article XIV of the Amendments to the Constitution of the United States.

71. If the court decide that the defendant is otherwise entitled to a new trial, the court cannot as a matter of law refuse a new trial on the ground that the defendant has waived anything either actually or constructively, as in a capital case it is impossible, as a matter of law, for a defendant to waive anything.

72. Having been furnished a list of qualified jurors, the law places the responsibility on the court of seeing to it that only such persons as are qualified shall sit. The prisoner may only interpose his objection by way of challenge, the number being fixed by statute. The fact that a juror otherwise qualified, is mentally disqualified being brought to the attention of the court, it is the latter's duty to see that he is not placed upon the panel. If he is allowed to sit upon the jury and during some part of the time while he is so sitting he becomes mentally disqualified, it is the duty of the court to undo the work in which the juror participated and to declare it a mistrial.

307 "G."

COMMONWEALTH OF MASSACHUSETTS,
Middlesex, ss:

Superior Court.

COMMONWEALTH, by Indictment,
vs.
CHESTER S. JORDAN.

Appeal.

And now comes the prisoner in the above entitled cause and appeals from the order of the court filed Saturday, November 14, 1909, denying the motion to set aside the verdict returned herein, on the ground of the insanity of Willis A. White one of the jurors sworn in the case.

CHESTER S. JORDAN,
By His Attorneys, CHAS. W. BARTLETT,
HARVEY H. PRATT,
JEREMIAH S. SULLIVAN.

308 [Endorsed:] Commonwealth, by Indictment, vs. Chester S. Jordan. Middlesex County. Defendant's Bill of Exceptions, embracing Questions raised on the Motion for a New Trial.

309 COMMONWEALTH OF MASSACHUSETTS:

Supreme Judicial Court for the Commonwealth, at Boston, Jan'y 3, 1911.

In the Case of

COMMONWEALTH
vs.
CHESTER S. JORDAN.

Pending in the Superior Court for the County of Middlesex.

Ordered, That the clerk of said court in said county make the following entry under said case in the docket of said court, viz.:

Order sustaining the demurrer to the plea to the jurisdiction affirmed. Exceptions contained in both bills of exceptions overruled.

By the Court.

C. H. COOPER, *Clerk.*

January 3, 1911.

310 *Brief Statement of the Grounds and Reasons of the Decision.*

The motion to quash & the motion that the District Attorney be required to furnish certain specified information were rightly overruled. The demurrer to the plea to the jurisdiction was rightly sustained. There was no error in regard to the matters of evidence or in regard to the instruction now relied on. It cannot be said that there was any error in regard to the manner in which the presiding justices dealt with the motion for a new trial or that there was any error in their findings in regard thereto or the disposition which they made of the same.

See opinion.

311 [Endorsed:] 23. Rescript. Supreme Judicial Court for the Commonwealth. Commonwealth vs. Chester S. Jordan. Middlesex, *ss:* Jan. 4, 1911. Filed in Clerk's Office.

312 COMMONWEALTH OF MASSACHUSETTS:

BOSTON, *February* 21, 1911.

I certify the annexed to be a true copy of the opinion of the Supreme Judicial Court in the case of Commonwealth vs. Chester S. Jordan, decided on the 3rd day of January, 1911.

HENRY WALTON SWIFT,
Reporter of Decisions.

313 MORTON, *J.:*

This was an indictment for the murder by the defendant of one Honora C. Jordan, who was his wife. There was a verdict of guilty of murder in the first degree, and the case is here on the defendant's exceptions and on his appeal from an order sustaining a demurrer to a plea to the jurisdiction. There are two bills of exceptions, the first relating to matters arising at and during the trial and prior thereto, and the other to matters arising at the hearing on the motion for a new trial.

We take up first the first bill of exceptions, and shall consider the various exceptions so far as practicable in the order in which they were taken.

Upon the return of the indictment and before the defendant had pleaded to it he made a motion that the district attorney be ordered to furnish him with a copy of the autopsy made by Thomas M. Durell, M. D., the medical examiner, and of the alleged con-
314 fession by the defendant to the police officers of Boston; also that he be ordered to furnish the defendant's attorneys with the names of all of the witnesses summoned before the grand jury when the indictment was found, and with a transcript of the evidence upon which the grand jury found the indictment, and to afford them an opportunity to inspect all weapons and other exhibits and things in the possession of the district attorney; and

lastly, that the district attorney be ordered to furnish to certain physicians designated by the defendant portions of the body taken at the time of the autopsy by the medical examiner. Before the hearing upon the motion the district attorney in accordance with the practice which prevails here (Commonwealth v. Edwards, 4 Gray 1, see also R. L. c. 218, s. 9), furnished the defendant with a list of the witnesses before the grand jury but declined to do any of the other things specified in the motion. The motion was heard by Aiken, C. J., and was denied except as to the list of witnesses before the grand jury which the district attorney had already furnished to the defendant. As to that it was granted. The defendant excepted to the refusal to allow the motion in respect to the other particulars specified. As to those matters it is plain, we think, that it was within the discretion of the judge to grant or refuse the motion. The motion was not in any just or proper sense a motion for a bill of particulars, but was rather an attempt (we do not use the word "attempt" in any invidious sense) to compel the Commonwealth to disclose, in part at least, the evidence on which it
315 relied. There is no rule of law which requires the Commonwealth to do that, or which gives a defendant the right to ask it. So far as the information specified, or any other information in the possession of the Commonwealth, was necessary in order to enable the defendant to understand the nature of the crime with which he was charged and to prepare his defense, he was entitled to have it furnished to him in the shape of a bill of particulars, upon a proper motion to that effect. But as we have said, this was not such a motion. The office of a bill of particulars is not to compel the Commonwealth to disclose its evidence, but to give the defendant such information in addition to that contained in the complaint or indictment in regard to the crime with which he is charged, as law and justice require that he should have in order to safeguard his constitutional rights and to enable him fully to understand the crime with which he is charged and to prepare his defense. Undue stress should not be laid upon the form of the motion, but it should at least appear that without the information which is desired justice will not or may not be done. See Commonwealth v. Snelling, 15 Pick. 321. There is no statutory provision requiring the district attorney to furnish the defendant with a copy of the report of the autopsy, though of course he can do so if he sees fit. See R. L. c. 24, s. 10. In the present case, even if we assume in favor of the defendant without so deciding, that we have power to revise the action of the Superior Court, we discover nothing that should lead us to do
316 so. This exception must therefore be overruled. It should be added that, although the exception was to a ruling by the Chief Justice, it seems to have been incorporated without objection into the bill of exceptions allowed by the Justices who presided at the trial, and we have dealt with it accordingly.

At the same time that the defendant filed the motion which we have been considering, he also filed a motion to quash the indictment on the ground that the alleged offense was not fully, plainly, formally and substantially described, or described in such a manner as to

apprise the defendant of the exact nature and cause of the offense intended to be charged, or to enable him to avail himself of his conviction or acquittal in a further prosecution for the same crime; or to inform the court of the facts alleged so that it could decide whether they were sufficient to support a verdict if one was rendered against the defendant; and also on the ground that R. L. c. 218, under which the indictment was drawn, was unconstitutional and void under article 12 of the Massachusetts Declaration of Rights and articles 5 and 14 of the Amendments to the Constitution of the United States. The motion to quash was overruled and the defendant excepted. The indictment is in the form prescribed for murder in the "Schedule of Forms of Pleadings" annexed to R. L. c. 218. There is no count at common law, and that is said by the defendant to distinguish this case from other cases of indictment for murder in which similar questions as to the constitutionality of the statute have been raised. It is true, as the defendant contends, that in previous cases of murder there has been a count at common law added to the count under the statute; but nevertheless we
317 think that the question as to the constitutionality of the statute must be regarded as having been settled in the affirmative by previous decisions in a variety of cases and, it seems to us, rightly so. Com. v. McDonald, 187 Mass. 581, 585. Com. v. Snell, 189 Mass. 12. Com. v. Sinclair, 195 Mass. 100. Com. v. Bailey, 199 Mass. 585. Com. v. King, 202 Mass. 379, 384. In Com. v. Storti, 177 Mass. 339, the court expressly declined to give any countenance to the suggestion that the statute was unconstitutional. The purpose of the constitutional provisions relied on is to secure to the accused such a description of the offence with which he is charged as will enable him fully to understand it and to prepare his defence. Com. v. Robertson, 162 Mass. 90. So far as enabling a defendant to understand the offence with which he is charged is concerned there can be no just ground of objection to the statutory form of indictment. If A is charged in an indictment with having at a certain time and a certain place which are specified assaulted and beaten B with the intent to murder him, and with having by such assault and beating killed and murdered the said B, A cannot fail to understand from the indictment itself that the crime with which he is charged is the murder of B at the time and place specified. Allegations as to how he killed B would not help him to understand any better the crime with which he is charged than, as was said in substance by Wells, J., in Com. v. Woodward, 102 Mass. 155, 160, a particular description of the wound would help the defendant to understand for what injury he was called upon
318 to answer. No question could arise as to the sufficiency of the facts alleged to support a conviction, or to embarrass the defendant if he should have occasion to file a plea of former conviction or acquittal. If the defendant should require a more particular description of the manner in which and the means by which the alleged crime was committed in order to enable him to prepare his defense, and the indictment could not for that reason be regarded as describing the crime charged "fully and plainly, substantially and

formally," the statute (R. L. c. 218, s. 39) gives him an absolute right to such particulars as it may be necessary for him to have in order to prepare his defence, and his constitutional rights are thus fully protected. Com. v. Snell, supra. Com. v. McDonald, supra. Com. v. Sinclair, supra. Com. v. Bailey, supra. Com. v. King, supra. The means by which a murder is committed do not constitute an essential part of the crime and therefore need not be alleged in the indictment under R. L. c. 218, s. 21. It is no doubt true, as contended by the defendant, that allegations as to the means by which and the manner in which the homicide was effected were formally regarded as essential to the validity of an indictment for murder. But the object of the statute is to simplify criminal pleading, and the question before us is, whether, in its efforts to do so, the Legislature has gone so far as to infringe upon the constitutional rights of the accused. For reasons given above we do not
319 think that it has. It follows from the construction and effect which we have given to the statute that, as was said by the Supreme Court of the United States in a case arising under a somewhat similar statute in New Jersey: "It cannot be held that he [the prisoner] was proceeded against under an indictment based upon statutes denying to him the equal protection of the laws, or that were inconsistent with due process of law as prescribed by the Fourteenth Amendment of the Constitution of the United States." (Bergemann v. Backer, 157 U. S., 655, 658,) or, we may add, by the Fifth Amendment. This exception also must be overruled.

The defendant seasonably filed a plea to the jurisdiction on the ground that the grand jury which returned the indictment was irregularly and unlawfully summoned and convened, in that in the towns of Bedford, Weston and Sudbury the list of persons prepared by the selectmen was unlawfully presented to and acted upon by the voters of said towns, and no lists of jurors from which jurors were to be drawn were prepared by the selectmen of said towns, and no lists were filed with either the town clerk of said towns, or with the clerk or assistant clerk of the Supreme Judicial or the Superior Court for the County of Middlesex; and also by reason of the alleged fact that the selectmen of Ayer, Framingham and Westford from which members of said grand jury were drawn, had not filed with the clerk and assistant clerk of the Supreme Judicial and Superior Courts lists of jurors as required by law; and further because
320 one Norbert M. English, who had been summoned as a member of said grand jury from Bedford and was acting as such when the indictment was returned was not an inhabitant of Bedford but of Lexington. The commonwealth demurred to the plea. The court, Stevens and Bell, JJ., sustained the demurrer and overruled the plea, and the defendant appealed. We think that the demurrer was rightly sustained. There is nothing to show and it is not claimed that any of the persons from the towns of Bedford, Weston and Sudbury or from the other towns named were personally disqualified or unfit or incompetent to serve. Although the plea alleges that no lists of jurors were prepared by the selectmen of the towns of Bedford, Weston and Sudbury, or either of them, the affidavits

annexed to the plea and referred to in it and made a part of it show that lists were prepared by the selectmen, and in two instances, Bedford and Sudbury, were submitted to and accepted by the voters, and that in the other, Weston, a list was submitted to but not acted on by the voters, on account of an amendment to the law in the preceding year. There is nothing to show that venires were not regularly issued and served, or that the jurors were not drawn from the lists prepared by the selectmen in the manner provided by law, or that in preparing the lists the selectmen did not observe the statutory requirements in regard to the persons placed thereon. The irregularity which occurred in submitting the lists to the voters in the two towns of Bedford and Sudbury could have had no effect upon the lists because the voters voted to accept them. Nor were the
321 lists affected in the case of those towns and the other towns named by the failure of the selectmen to file with the town clerk and the clerk and assistant clerk of the Supreme Judicial or Superior Court lists of jurors as required by statute. (St. 1907, c. 348, s. 5.) Such failure did not and could not affect in any way the qualifications of the jurors or the preparation of the lists, or the manner of drawing jurors, or the constitution of the jury as finally determined, and the provisions referred to must therefore be regarded as directory and not mandatory; in other words although it no doubt was expected that the scrutiny to which the lists would be thereby subjected would aid still further in the elimination of objectionable persons from juries, the requirements in question are to be regarded rather as incidental than as fundamental. In the matter of English it does not appear that the selectmen of Bedford knew when English was drawn as a juror from that town that he had removed to Lexington, if indeed he had. The allegation of the plea is that at the time of the finding and return of the indictment he was not an inhabitant of Bedford, not that at the time when he was drawn he was not an inhabitant of Bedford. If he was an inhabitant of Bedford when drawn it would seem that that was enough, and that his subsequent removal before the finding and return of the indictment did not disqualify him from acting with the grand jury. But however that may be, and even if his action in sitting on the grand jury after his removal to Lexington was irreg-
322 ular and improper, the case comes clearly within the principle laid down in Com. v. Brown, 147 Mass. 585, 593, where one whose name had been ordered by a vote of the town to be stricken from the list was nevertheless drawn as a juror by the selectmen and returned to court as such and was sworn as one of the grand jury and acted with them in their deliberations and the return of the indictment. It was held that as there was nothing to show that he was disqualified, or that his being drawn was anything more than an irregularity, a ruling of the trial court that the presentment was valid was correct. See also Com. v. Moran, 130 Mass. 281, Com. v. Parker, 2 Pick. 550; Amherst v. Hadley, 1 Pick. 38.

What we have said in regard to the matter of filing lists with the clerk or assistant clerk of the Supreme Judicial and Superior Courts

applies to the case of the juror Wallace from Framingham, whom the defendant contended that he had a right to challenge for cause, since it appeared that the list prepared by the selectmen of Framingham, upon which was his name, had not been filed with the clerk of the Supreme Judicial Court or with the clerk of the Superior Court within the time required by law, it appearing that the list should have been filed on or before the first day of August, 1908, but was not in fact filed until the thirteenth day of April, 1909. The court ruled that the failure to file the list was not cause for challenge, and the defendant excepted. Thereupon the juror was peremptorily challenged by the defendant, and it appeared that when the panel was completed the defendant had not exhausted his peremptory challenges. We doubt whether it can be said as
323 contended by the Commonwealth that the defendant was not harmed by the ruling. But however that may be, we think that for reasons previously stated, and which it is unnecessary to repeat the ruling was right. It follows that the order sustaining the demurrer and overruling the plea must be affirmed, and the exception to the ruling in regard to the Juror Wallace must be overruled.

Certain exceptions which were taken to the admission of certain evidence have been waived, and therefore need not be considered. Other exceptions to the admission of evidence have not been waived, and are relied on, and we proceed to consider them. There was evidence that the head had been severed from the body by two cuts, one in the back of the neck and the other in the throat in front severing the arteries. It was in dispute whether the cut in the throat was made before or after death. One of the things relied on by the defendant to show that the cut was made after death and therefore was not a cause of death was that it was what was termed "inverted." In the course of the cross-examination by the defendant of Dr. Durell, the medical examiner for the second district of Middlesex County, he was asked, counsel at the time holding in his hand a book from which he was apparently framing the question, "If Professor Balch of the Albany Medical School said that the inverted edge was evidence of a cut after death would that change the opinion which you now express that the * * * [cut] * * * may be ante mortem?" Upon objection by the district
324 attorney the question was excluded and the defendant excepted. The question, though put perhaps alio intuitu, would if allowed to be answered have placed before the jury in an indirect manner the opinion of Professor Balch who was not a witness in the case or in any way connected with it, and was referred to simply as a medical authority, and it was therefore rightly excluded. It is well settled in this Commonwealth that medical books are not admissible in evidence for the purpose of showing the views entertained by their authors in regard to the matters in dispute. Com. v. Sturtivant, 117 Mass. 122, 139. The exception is overruled.

It was for the jury to say whether there was evidence which warranted the existence of the events assumed to exist in the hypo-

thetical question put on cross-examination by the district attorney to Dr. Councilman, an expert called by the defendant, and their sequence if that was material. It could not have been ruled as requested that there was no evidence warranting the question in the form in which it was finally put. The exception to its admission must, therefore, be overruled.

Numerous requests for instructions were presented. Many of them were given in substance as requested. Others were given with some modification, and the rest were refused. A number of those refused have been waived or abandoned. It is necessary, therefore, that of those originally presented only the ones now relied on should be considered. Those are the requests numbered 15 to 23, inclusive, and the request numbered 36.

325 The Commonwealth contended that there was evidence of asphyxiation or strangulation, and of blows on the head, and also that there was evidence that the throat was cut during life. It also claimed that it was not obliged to show the exact sequence of the events which resulted in the homicide, or to show that death was due to any one particular cause, but that it was sufficient if the jury were satisfied beyond a reasonable doubt that death was caused by a combination of injuries inflicted by the defendant notwithstanding they were unable to determine the exact way in which the deceased was killed; and the court in substance so instructed the jury. What the court said was, after instructing the jury in regard to the effect to be given to the evidence of mutilation after death, and after giving the ruling requested by the defendant's request in relation thereto, "In this case the exact manner in which he [the defendant] killed his wife, I shall instruct you, is not material. The question is, Did he kill her, and was he sane when he killed her, and was it done with deliberately premeditated malice aforethought, or with malice afterthought? The exact mode it may be impossible for you or for any one else to determine, but the failure to determine the exact way in which she was killed is not to exempt this defendant from punishment provided he did kill her, and killed her with such intention and under such circumstances as to constitute a crime against the law." The court had previously instructed the jury in regard to the degrees of murder, and the burden of proof and

326 the matter of reasonable doubt in a manner to which no exception was taken by the defendant. The requests relied on were to the effect in one form or another according to the phase of the case with which they dealt, that it was not proved beyond a reasonable doubt that the deceased came to her death in any one of the possible ways testified to. The court was asked to rule for instance, that "it is not proved beyond a reasonable doubt that the throat of the deceased was cut during life." And the same request was made in regard to death from the blows on the head, and death by strangulation—the defendant seeking thus to eliminate one by one, as causes of death, the cutting of the throat, the blows upon the head and strangulation, and then contending that inasmuch as it was not proved beyond a reasonable doubt that either one of those things was the cause of death, it followed that death could not have

been occasioned by a combination of any or all of them and, therefore (to carry out the reasoning to its logical conclusion) that the Commonwealth had failed to show that the defendant murdered his wife, although it was certain, according to his own confession, that he and no one else killed her. The error lies in the assumption which runs through all of the requests relied on that it was necessary for the Commonwealth to show beyond a reasonable doubt the exact mode in which the deceased came to her death. The Commonwealth was bound to show beyond a reasonable doubt that the deceased had been murdered and that the murder was committed by the defendant. It was also bound, as the court instructed the jury, to
327 prove beyond a reasonable doubt every fact necessary to establish those conclusions. If the manner in and the means by which a murder is committed constitute an essential part of the crime, or if a jury could not as a matter of fact or as matter of law find that a murder had been committed, if they were unable to find beyond a reasonable doubt the exact mode in which death had been caused, then the instructions requested should have been given. But neither one of the propositions thus suggested is true. The court correctly instructed the jury that the exact manner in which the defendant killed his wife was immaterial, and that the fact that it was impossible to determine the exact way in which she was killed would not serve to acquit the defendant provided the act of killing constituted otherwise a crime. It follows that the requests now relied on were rightly refused and that the defendant's exceptions to such refusal must be overruled.

The result is that we discover no error in the rulings and refusals to rule in regard to what took place at and during and before the trial.

We pass to the second bill of exceptions. The verdict was rendered on Tuesday, May, 4, 1909, the case having been on trial since April 20. On the eighth day of the same May, four days after the verdict, Willis A. White, who had been drawn as a juror from Maynard, and who was one of the panel during the trial and at the time when the verdict was rendered was committed to the insane hospital at Worcester. On the tenth of May the defendant filed a mo-
328 tion for a new trial on the ground that said White was insane during the trial and when the verdict was rendered. There was a lengthy hearing upon the motion. At the conclusion of the testimony the defendant made a large number of requests for rulings and findings,—seventy-two in all. The presiding judges overruled the motion and found and ruled as follows: "We find by a fair preponderance of all the evidence as a fact that the juror Willis A. White was of sufficient mental capacity during the entire trial of Chester S. Jordan until after the verdict was returned, to intelligently consider the evidence, appreciate the arguments of counsel, the rulings of law, the charge of the court, and to arrive at a rational conclusion, and therefore we deny the motion. Having found the above facts, we deem it unnecessary to consider the requests for rulings."

The defendant appealed from and excepted to the order over-

ruling the motion, to the findings aforesaid, and to the refusal to rule and find as requested in the seventy-two rulings and findings that were asked for. All of the material evidence taken at the hearing upon the motion is before us. Although the requests were so numerous and voluminous, the issues, as the defendant himself concedes, are comparatively simple.

The principal question relates to the burden of proof and the rule to be applied in weighing the evidence on the question of the juror White's sanity or insanity. If on an issue between the Commonwealth and the defendant as to the sanity of a juror during the trial and at the time of the rendering of the verdict, raised by
329 the defendant by a motion for a new trial, the burden is, as the defendant in substance asked the court to rule, on the Commonwealth to show beyond a reasonable doubt that the juror was sane, then clearly some of the rulings asked for—it is not necessary to decide which—should have been given and the defendant's exceptions should be sustained. There can be no doubt that the defendant has a right to insist that the panel which tries him should consist of twelve sane jurors. And there can be no doubt that if without his knowledge or that of his counsel one of the jurors to whom his case was submitted was insane during the trial and at the time when the verdict was rendered he has not had such a trial as is guaranteed to him by the Constitution of this Commonwealth and by the Constitution of the United States. It is practically agreed that neither the defendant nor his counsel had any knowledge of White's alleged insanity until after the verdict, and therefore no question can arise as to the defendant's right to avail himself of the alleged insanity.

Ordinarily the party asserting the affirmative of an issue has the burden of proof, and we do not see why the ordinary rule should not apply here. The defendant asserts that one of the jurors was insane during the trial and when the verdict was rendered, and that therefore the verdict should be set aside. It is for him to prove what he says, not beyond a reasonable doubt, but by a fair preponderance of the whole testimony. The inquiry into the sanity or in-
330 sanity of the juror is not an investigation into an alleged crime, and has none of the elements of such an investigation, and the rules relating to criminal practice and pleading are, therefore, in no way applicable to it. Nor is the sanity or competency of the jury in any way involved in the question of the defendant's guilt or innocence. It is not in the remotest degree an issue in the case. If a question is raised as to the defendant's sanity, that becomes thereby an issue, and the burden is on the Commonwealth to show that he was sane. But that has nothing to do with the question whether a juror was sane or insane during the trial. The government was and is no more responsible for the presence upon the panel of the juror White than the defendant or the court. As finally constituted the jury was the tribunal appointed by law for the trial of the case. Its members were selected in the manner provided by law from the body of the citizens of the county, and in case a question arose during or after the trial as to the sanity or insanity,

of one of them the burden was upon the party alleging the insanity to prove it, by a fair preponderance of the evidence, not upon the Commonwealth to show that the juror was sane. It follows from what we have said that the only question that remains is whether there was evidence which warranted as matter of law the findings of fact made by the trial court upon the motion for a new trial. We assume in favor of the defendant that the presiding judges overruled the motion for a new trial not merely in the exercise of their discretion but because they found the facts which they did
331 upon a fair preponderance of the evidence. We do not see how it can be said that there was not evidence warranting their findings.

When the time for the hearing upon the motion approached, counsel for the defendant addressed a communication to the court stating that they deemed it advisable that all of the jurors except White should testify, and asking the direction of the court in regard to the matter. The court replied saying that if any of the jurors were called all should be, and that they should be put upon the stand without any previous communication with any one. Thereupon the other eleven jurors were summoned and testified. Of the eleven jurors who thus testified seven said in substance and effect that they saw nothing during the trial in the actions, speech, manner or conduct of White different from that of the ordinary, sane, normal man. The other four jurors were all cross-examined by the district attorney; one testified on such cross-examination that it did not occur to him at any time that Mr. White was insane or that he did not understand the proceedings; another, that until after the verdict he did not see anything in White's acts, speech or conduct that showed that he did not understand the proceedings and the part he took in them, or that his memory was defective; and a third that he did not notice anything about White's memory that was defective any more than that of any other of the jurors, and that he appeared to be as much interested in the trial as any other
332 juror. In addition to the testimony of the jurors there was testimony from Dr. Quinby, the superintendent of the Worcester Asylum to which White was committed, that in his opinion White was sane until the day after the verdict, and that his insanity then was due to the reaction from the strain and stress of the trial and other matters. There was also testimony from the family physician and others tending to show that White was sane. On the other hand there was testimony from medical experts on insanity, including Dr. Jelly, Dr. Sanborn, superintendent of the State Asylum at Augusta, Maine, and Dr. McDonald, formerly at the Butler Asylum for the Insane at Providence, to the effect that in their opinion he was insane during the trial and when the verdict was rendered. There was also testimony tending to show that insanity was hereditary in the family; and there was testimony from neighbors and friends tending to show that he was insane. Letters written by him during the trial which, it was maintained, also tended to show that he was insane, were introduced in evidence. The question before us, however, is not as to the weight of the evi-

dence, but whether it can be said as matter of law that the findings were not warranted by the evidence. It is plain, it seems to us, that it cannot be so ruled. It follows that the exceptions to findings and rulings and refusals to rule on the motion for a new trial must be overruled.

Order sustaining demurrer to the plea to the jurisdiction affirmed. Exceptions contained in both bills of exceptions overruled.

333 [Endorsed:] Commonwealth vs. Chester S. Jordan. Certified copy of the opinion of the Supreme Judicial Court.

334 COMMONWEALTH OF MASSACHUSETTS.
Middlesex, ss:

Superior Court.

COMMONWEALTH, by Indictment,
vs.
CHESTER S. JORDAN.

And now, on the sixth day of January in the year of our Lord one thousand nine hundred and eleven, the said Chester S. Jordan, under the custody of the Sheriff of said County, again comes before the Court, in his own proper person, and thereupon John J. Higgins, Esquire, the District Attorney for said County, in behalf of the Attorney General for the Commonwealth, moves that the sentence provided by law may be passed upon him the said Chester S. Jordan: upon which it is demanded of the said Chester S. Jordan if he have or know aught to say why the Justice here present ought not, upon the premises and the plea and the conviction of the said Chester S. Jordan to proceed to pass sentence upon him: who, nothing further hath to say, except as before he hath said. Whereupon all and singular the premises being seen and understood by the Justice here, it is considered and ordered by the Court that said Chester S. Jordan suffer the punishment of death by the passage of a current of electricity through his body within the week beginning on Sunday, the twelfth day of March, in the year of our Lord one thousand nine hundred and eleven.

Warrant for execution issued.

335 COMMONWEALTH OF MASSACHUSETTS.
Middlesex, To wit:

At the Superior Court, Begun and Holden at Lowell, within and for the County of Middlesex, on the First Monday of March, in the Year of our Lord One Thousand Nine Hundred and Nine.

The Jurors for the Commonwealth of Massachusetts on their oath present, That Chester S. Jordan on the first day of September in the year of our Lord one thousand nine hundred and eight at Somerville, in the County of Middlesex aforesaid, did assault and beat Honora

C. Jordan with intent to murder her, and by such assault and beating, did kill and murder the said Honora C. Jordan. Against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

The indictment was found by the Grand Jury and entered in this Court on the fifth day of April in the year of our Lord one thousand nine hundred and nine, and it appearing to said Court that said indictment charged the said defendant with a crime punishable with death, it was ordered by the Court that said Chester S. Jordan be held in custody of the Sheriff of said County of Middlesex to answer to said indictment, and that he be notified that said indictment would be entered forthwith upon the docket of said Court by causing him to be served with an attested copy of said indictment and of the orders of the Court thereon as soon as conveniently might be. In obedience to said orders, said Chester S. Jordan was notified as thereby required, and said indictment was entered of
336 record upon the docket thereof. On the thirteenth day of April, A. D. 1909, said defendant filed a motion that the District Attorney be ordered to furnish a copy of the report of the autopsy and other matters intended to be used in evidence, which motion was afterwards denied except as to specification 5, which appeared to have been complied with. On the fifteenth day of said April, said Chester S. Jordan filed his motion to quash, which said motion was overruled, and subsequently the defendant appealed to the Supreme Judicial Court for said Commonwealth. On said fifteenth day of April, said defendant filed his plea to the jurisdiction, and said Commonwealth filed its demurrer to said plea, which said demurrer was sustained by the Court. Subsequently said Chester S. Jordan appealed from the order sustaining said demurrer to the Supreme Judicial Court for the Commonwealth. On said fifteenth day of April, A. D. 1909, said Chester S. Jordan, being in Court under the custody of the Sheriff of said County, was arraigned at the bar in his own proper person, and the said indictment being read to him, and he being forthwith demanded concerning the premises to the said indictment above specified and charged upon him, said that thereof he was not guilty, and he was thereupon ordered to be committed into the custody of the Sheriff of said County without bail or mainprise. On the seventeenth day of said April, said Chester S. Jordan filed his exceptions to the order on the motion that the District Attorney be required to furnish a copy of the report of the autopsy and other matters intended to be used in evidence, and also filed exceptions to the overruling of his motion to quash the said indictment, which exceptions were reduced to writing.

337 On the twentieth day of April, A. D. 1909, again came the said Chester S. Jordan, under the custody of the Sheriff, before the Court, the Honorable William B. Stevens and Charles U. Bell presiding, and for trial of said indictment put himself upon the country. A jury was thereupon empanelled and sworn to try the issue, viz: Newell H. Felton, foreman, appointed by the Court,

and fellows, to wit: Willis A. White, Perry B. Howard, Timothy F. Sheehan, George B. Vaughn, Thomas Smallwood, Ottar T. Bryn, John Cullen, Thomas F. Stafford, Charles B. Hurley, Jerry T. Morrill and James Culhane, who, being sworn to speak the truth concerning the premises, did, on the fourth day of May, in the year of our Lord one thousand nine hundred and nine upon their oaths say that the said Chester S. Jordan is guilty of murder in the first degree. Thereupon said Chester S. Jordan, being aggrieved by the opinions, rulings and directions of the Court given at the trial, alleged exceptions thereto, which, being reduced to writing, were filed with the clerk on the second day of June in the year of our Lord one thousand nine hundred and nine, to which time the filing thereof had been extended, and were, together with the exceptions filed prior to the trial, allowed by the presiding Justices. On the eleventh day of June, A. D. 1909, said defendant filed his motion to set aside said verdict and for a new trial, which motion was afterwards denied, and the defendant thereupon appealed from the order denying said motion to the Supreme Judicial Court for the Commonwealth, and said defendant also alleged exceptions thereto which, being reduced to writing were filed with the clerk and allowed by the presiding Justices. On the fourth day of January in
338 the year of our Lord one thousand nine hundred and eleven, a rescript from said Supreme Judicial Court was filed in the case in words following, to wit: "Order sustaining the demurrer to the plea to the jurisdiction affirmed. Exceptions contained in both bills of exceptions overruled."

And now, on this sixth day of January in the year of our Lord one thousand nine hundred and eleven, the said Chester S. Jordan, under the custody of the Sheriff of said County, again comes before the Court, in his own proper person, and thereupon John J. Higgins, Esquire, the District Attorney for said County, in behalf of the Attorney General for the Commonwealth, moves that the sentence provided by law may be passed upon him the said Chester S. Jordan; upon which it is demanded of the said Chester S. Jordan if he have or know aught to say why the Justice here present ought not, upon the premises and the plea and the conviction of the said Chester S. Jordan to proceed to pass sentence upon him; who, nothing further hath to say, except as before he hath said. Whereupon all and singular the premises being seen and understood by the Justice here, it is considered and ordered by the Court that said Chester S. Jordan suffer the punishment of death by the passage of a current of electricity through his body within the week beginning on Sunday, the twelfth day of March, in the year of our Lord one thousand nine hundred and eleven.

Warrant for execution issued.

339 In testimony that the foregoing is a true copy of the record, conviction and sentence of Chester S. Jordan, I hereunto set my hand and affix the seal of said Superior Court, at Cambridge,

in said County of Middlesex, this twenty-first day of January, in the year of our Lord one thousand nine hundred and eleven.

[Seal of the Superior Court.]

WM. C. DILLINGHAM,
Ass't Clerk.

340 All which premises we have held good by the tenor of these presents to be exemplified.

In testimony whereof, we have caused the seal of our said Superior Court to be hereunto affixed.

Witness, John A. Aiken, Esquire, Chief Justice of our said Superior Court, at Cambridge, this twenty-first day of February in the year of our Lord one thousand nine hundred and eleven.

[Seal of the Superior Court.]

WM. C. DILLINGHAM,
Ass't Clerk.

341 Supreme Court of the United States.

No. 920, October Term, 1910.

CHESTER S. JORDAN, Plaintiff in Error,
vs.
COMMONWEALTH OF MASSACHUSETTS, Defendant in Error.

Stipulation.

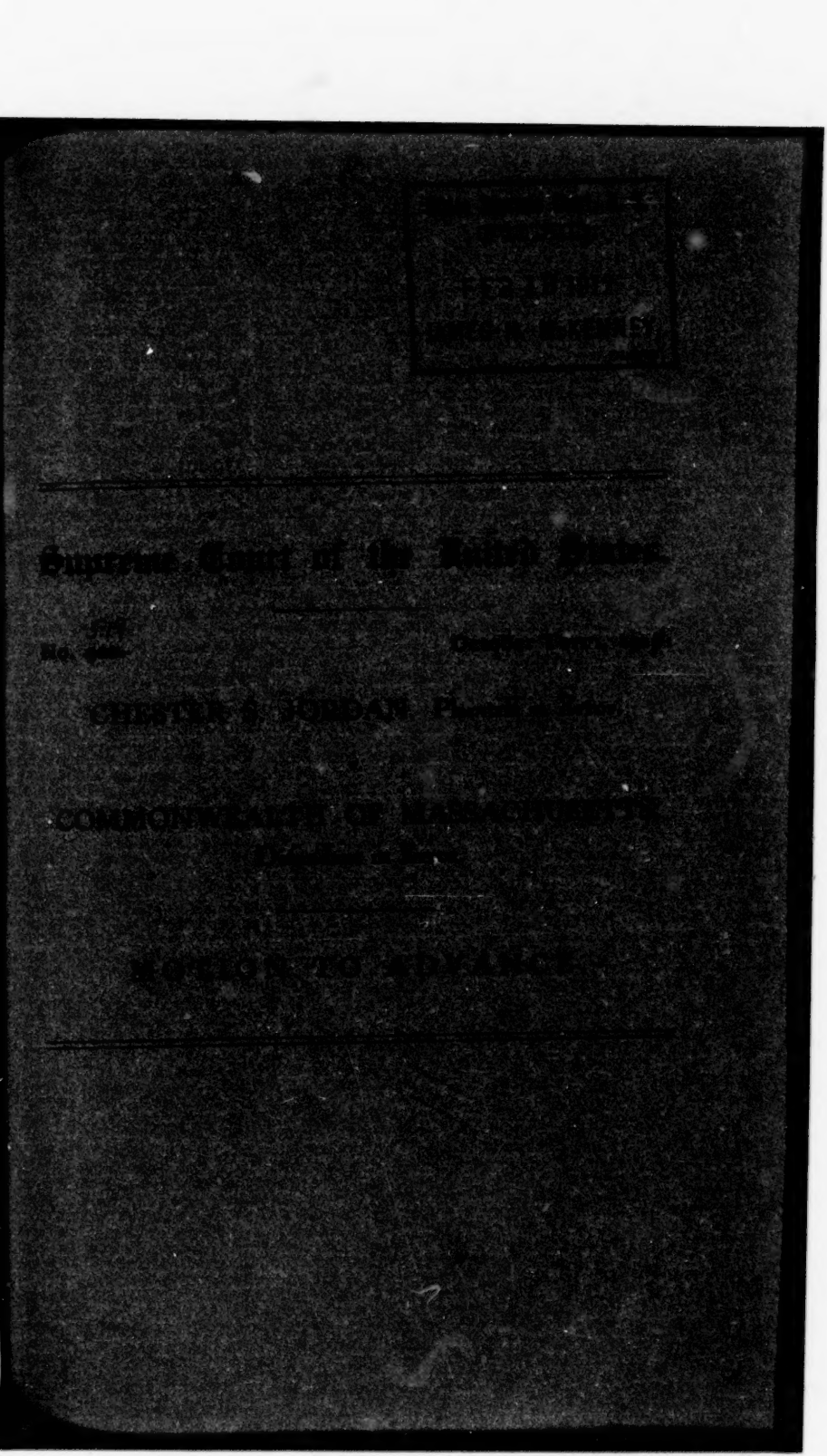
It is hereby agreed that the following portions only of the record in the above entitled case be printed:

CHAS. W. BARTLETT,
Attorney for Chester S. Jordan,
Plaintiff in Error.
JAMES M. SWIFT,
Attorney General.
Attorney for Commonwealth of Massachusetts,
Defendant in Error.

344 [Endorsed:] 519/22,541. October Term, 1911. 920. Chester S. Jordan, Plaintiff in Error, v. Commonwealth of Massachusetts, Defendant in Error. Stipulation.

345 [Endorsed:] File No. 22,541. Supreme Court U. S. October Term, 1911. Term No. 519. Chester S. Jordan, Pl'ff in Eror, vs. Commonwealth of Massachusetts. Stipulation as to parts of record to be printed. Filed August 14th, 1911.

Endorsed on cover: File No. 22,541. Massachusetts Superior Court. Term No. 519. Chester S. Jordan, plaintiff in error, vs. The Commonwealth of Massachusetts. Filed February 23, 1911. File No. 22,541.



Supreme Court of the United States.

No. 519. October Term, 1911.

CHESTER S. JORDAN, Plaintiff in Error,

v.

COMMONWEALTH OF MASSACHUSETTS, Defendant in Error.

Motion to Advance.

Now comes the Commonwealth of Massachusetts and moves that this cause be advanced upon the docket of the court, to be heard and argued before adjournment of this term of the court.

Brief Statement of the Matter Involved.

The plaintiff in error was charged by indictment with murder. On May 4, 1909, in the Superior Court of the Commonwealth of Massachusetts, a verdict of murder in the first degree was rendered. On May 10, 1909, the plaintiff in error filed a motion for a new trial on the ground that one of the jurors, one Willis A. White, who was sworn in the case, acted upon the panel and agreed to the verdict, was insane. At the hearing the plaintiff in error made certain requests for findings and rulings. On November 14, 1909, the court found and ruled as follows: —

"We find by a fair preponderance of all the evidence as a fact that the juror Willis A. White was of sufficient mental capacity during the entire trial of Chester S. Jordan until after the verdict was returned, to intelligently consider the evidence, appreciate the argu-

ments of counsel, the rulings of law, the charge of the court, and to arrive at a rational conclusion, and therefore we deny the motion.

Having found the above fact we deem it unnecessary to consider the requests for rulings."

The plaintiff in error excepted to the order denying the motion, to the findings and to the refusal to rule and find as requested. The exceptions were overruled by the Supreme Judicial Court on January 3, 1911. Commonwealth *v.* Jordan, 207 Mass. 259. On January 6, 1911, the plaintiff in error was sentenced to the punishment of death. Thereafter, this writ of error was taken out. The errors assigned are, in general, that the plaintiff in error was deprived of his rights under Article XIV of the Amendments to the Constitution of the United States.

Reasons for this Motion.

This is a writ of error to revise the judgment of a State court in a criminal case, and is entitled to precedence on the docket of this court, under the provisions of the act of congress of March 3, 1911, chapter 231, section 253, and was previously so entitled under the provisions of the U. S. Rev. Sts., § 710.

JAMES M. SWIFT,

Attorney General of the Commonwealth of Massachusetts.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 519.

CHESTER S. JORDAN, PLAINTIFF IN ERROR,

vs.

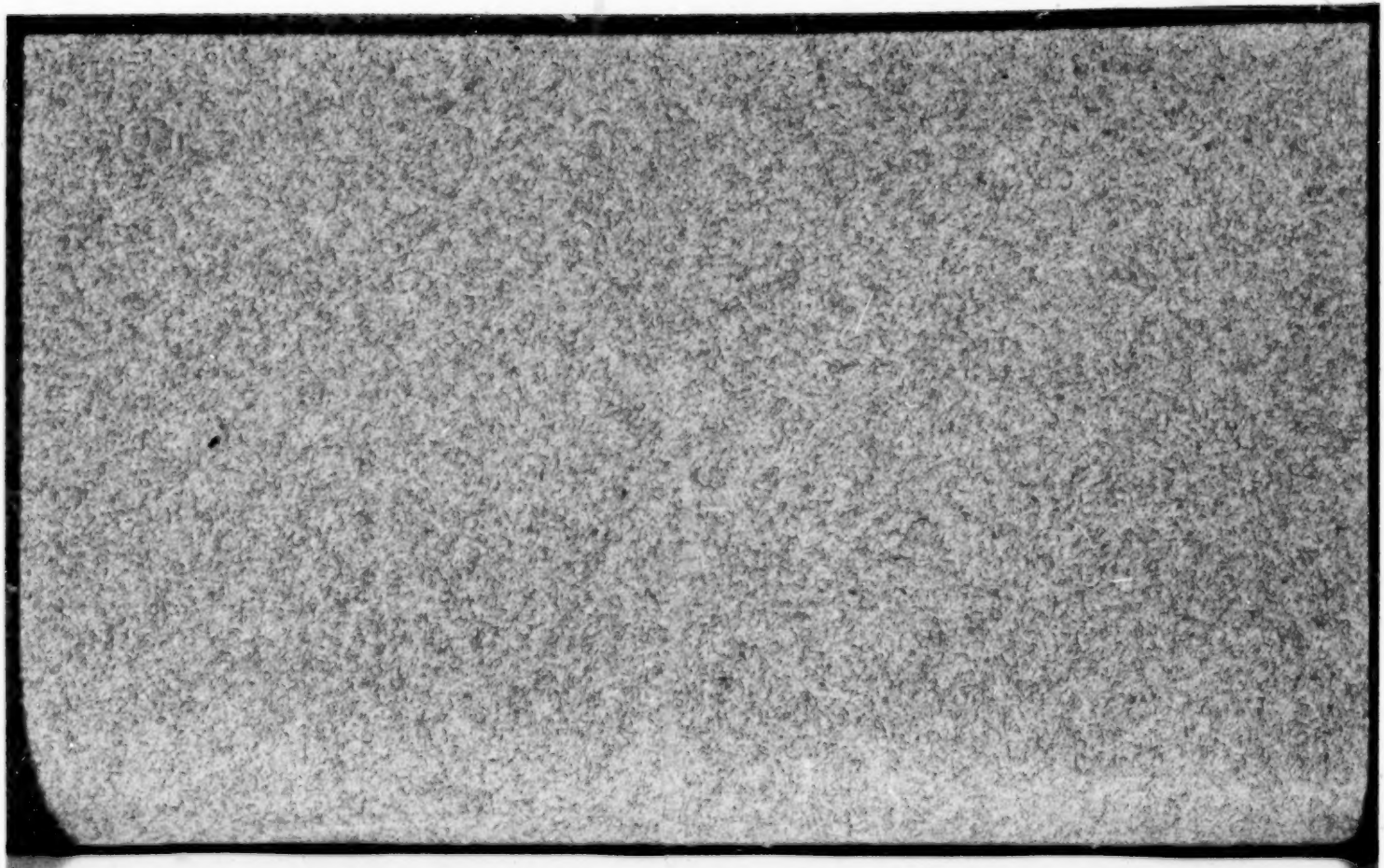
THE COMMONWEALTH OF MASSACHUSETTS.

IN ERROR TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

BRIEF OF PLAINTIFF IN ERROR.

CHARLES W. BARTLETT,
HARVEY H. PRATT,
JEREMIAH S. SULLIVAN,
ARTHUR THAD SMITH,
Attorneys for Plaintiff in Error.

(22,541)



(22,541)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1911.

No. 519.

CHESTER S. JORDAN, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF MASSACHUSETTS.

IN ERROR TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

BRIEF OF PLAINTIFF IN ERROR,

STATEMENT OF THE CASE.

This case comes before this Court on writ of error to the Superior Court of the Commonwealth of Massachusetts. The plaintiff in error, hereinafter called the prisoner, was charged by indictment returned into the Superior Court of the Commonwealth of Massachusetts, sitting in and for the County of Middlesex on the fifth day of April, 1909, with the crime of murder. To said indictment he pleaded that he was not guilty and on the 20th day of April, 1909, was brought before said Superior Court, Stevens and Bell, JJ., sitting, for trial upon said indictment. The jury that was impanelled and sworn to try the issue of his guilt, upon the 4th day of May, at about noon of said day, found the prisoner guilty of murder in the first degree. (Record, pp. 88, 89.) Among the members of said jury was one Willis A. White, who upon the 8th day of said May was lawfully committed to the Bloomingdale Asylum for the Insane

at Worcester, Massachusetts, as an insane person. (Record, p. 12.) Upon the 10th day of the same May the prisoner filed a motion in said Superior Court that the said verdict be set aside and a new trial granted, (Record, p. 56) suggesting that said Willis A. White "was insane during the trial of the prisoner upon the indictment in the above entitled cause and at the time said verdict was agreed upon and rendered." Hearings upon said motion were had orally before the trial justices Stevens and Bell, JJ. on the 25th day of September, the 2nd, 9th and 16th days of October, 1909; (Record, p. 12) and a complete record of the evidence and proceedings at said motion for a new trial is included in the record from pages 12 to 76, both inclusive.

After the evidence was closed at said hearings upon said motion to set aside said verdict and for a new trial, and before argument, the prisoner made certain requests for rulings and findings to the trial justices (Record, pp. 66 to 75 inclusive.) These requests among other things called upon them to rule that if upon all the evidence produced at the hearing upon the said motion, they were unable to find beyond a reasonable doubt, and were therefore in reasonable doubt whether the juror Willis A. White was sane at the time of the rendition of the verdict against the prisoner and during said trial, as a matter of law the said verdict rendered against the prisoner must be set aside on the ground that the prisoner had been deprived of his rights under the Fourteenth Amendment to the Constitution of the United States:—in that due process of law was not observed, because the tribunal before which he was compelled to defend himself and which rendered a verdict of guilty against him, contained as one of its members a man mentally incapable to intelligently hear the defence of the prisoner and render a verdict against him.

Upon the 14th day of November, 1909, the trial justices (Record, p. 54) denied the motion above referred to, failed to find said Juror Willis A. White sane beyond a reasonable doubt and refused to set aside said verdict, solely upon the ground that by a fair preponderance of all of the evidence they found as a fact that the juror White was of sufficient mental capacity to act as a juror. As the trial justices were unable to find the said juror Willis A. White sane beyond a reasonable doubt, and were

in reasonable doubt with reference to the same, the prisoner seasonably excepted to the refusal of the trial justices to grant his requests for rulings hereinbefore referred to and also seasonably excepted to the overruling of his motion to set aside said verdict by the trial justices for the reasons stated by them. His exceptions appear upon pages 54, 55 and 56 of the record. Said exceptions were considered in due course by the Supreme Judicial Court of the Commonwealth of Massachusetts and upon the 4th day of January, 1911, said Supreme Judicial Court handed down a rescript overruling them. (Record, p. 77). The opinion of the Supreme Judicial Court with reference thereto appears in the record, pages 77 to 87 inclusive, the particular portions of said opinion having reference to questions raised before this Court appearing on pages 84, 85, 86 and 87 of the record. In substance the Supreme Judicial Court of Massachusetts ruled that there was no error in the refusal of the trial justices to set aside the verdict in question, even though they were unable to find beyond a reasonable doubt that the juror Willis A. White was sane during the trial of and at the time of the rendering of the verdict against the prisoner, on the ground that as will be hereinafter argued, it did not appear that the juror Willis A. White was affirmatively insane, and that the constitutional rights of the plaintiff in error were preserved in that a juror concerning whose sanity there is a reasonable doubt is a proper juror in a capital case within the meaning of the Fourteenth Amendment to the Constitution of the United States.

On the 6th day of January, 1911, the prisoner was sentenced in and by said Superior Court to suffer the punishment of death, within the week beginning Sunday the 12th day of March, 1911 and a warrant for said execution was duly and lawfully issued. (Record, p. 87.)

Thereupon the plaintiff in error sued out this writ of error to said Superior Court of the Commonwealth of Massachusetts, (Record, p. 1) assigning the errors appearing upon pages 5 to 10 of the record.

The question presented for the consideration of this Court as hereinafter set forth and argued in detail, is whether the plaintiff in error having been compelled to present his defense to, and suffer a verdict at the hands of a jury concerning the sanity of one of the members of which there was a reasonable doubt,

and upon which verdict the plaintiff in error is under judgment of death, has been denied his rights as a citizen of the United States under the clause of the Fourteenth Amendment to the Constitution of the United States, prohibiting a state from depriving any person of life, liberty or property without due process of law, or denying to any person within its jurisdiction the equal protection of the laws.

SPECIFICATION OF THE ERRORS RELIED UPON.

The assignments of error appear on pages 5 to 10 of the record, inclusive, and are twenty-nine in number. Those which are specifically relied upon, and which are hereinafter set forth, really present but a single question for the consideration of this court. Out of abundant caution, however, they are drawn to cover any possible phase, that consideration of this question may assume. All of them, with the exception of the 29th are based upon the refusal of the trial justices to rule in accordance with the law as requested by the prisoner upon the different phases of the evidence before them. The 29th assignment of error is based upon the exception duly and seasonably taken, to the refusal of the trial court to grant to the prisoner a new trial to which he claimed he was entitled, as a matter of law, upon the particular finding made by the trial justices. The assignments of error seek to raise for the consideration of this Court the single question, whether the prisoner, having been compelled to present his defence and suffer a verdict at the hands of a jury concerning the sanity of one of the members of which, there was a reasonable doubt, upon which verdict the prisoner is under judgment of death, has been denied his rights as a citizen of the United States under the clause of the Fourteenth Amendment to the Constitution of the United States, prohibiting a state from depriving any person of life, liberty or property without due process of law, or denying to any person within its jurisdiction the equal protection of the laws.

The following assignments of error are relied upon:

1. Said Superior Court erred in refusing to rule upon all the evidence, as a matter of law, that the petitioner hereinafter called the defendant and prisoner, was entitled to a new trial.

2. Said Superior Court erred in refusing to rule as requested by the defendant, that it is not incumbent as a matter of law upon the defendant to satisfy the court by a fair preponderance of the evidence or beyond a reasonable doubt that, the juror White was not of sufficient mental capacity during the late trial of the Commonwealth against the defendant, in order to entitle the defendant to a new trial; but if the evidence creates a reasonable doubt in the mind of the court as to whether the juror White was at any time during the introduction of evidence or the deliberations of the jury at the trial of the Commonwealth against the defendant, of not sufficient mental capacity to enable him to perform his duties intelligently, then as a matter of law, the defendant is entitled to a new trial.

3. Said Superior Court erred in refusing to rule that it is not incumbent as a matter of law upon the defendant to satisfy the court by a fair preponderance of the evidence or beyond a reasonable doubt, that the juror White was not of sufficient mental capacity during the late trial of the Commonwealth against the defendant in order to entitle the defendant to a new trial; but if the evidence creates a reasonable doubt in the mind of the court as to whether the juror White was throughout the entire trial of the Commonwealth against the defendant of not sufficient mental capacity to enable him to perform his duties intelligently, then as a matter of law, the defendant is entitled to a new trial.

4. Said Superior Court erred in refusing to rule that when the question of the insanity or lack of mental capacity of a juror during the trial of a capital case is raised by the defendant by sufficient evidence at a hearing on a motion for a new trial for that cause, the defendant is entitled as a matter of law to a new trial, unless the Commonwealth establishes beyond a reasonable doubt the sanity or mental capacity during the trial.

5. Said Superior Court erred in refusing to rule that when in a hearing on a motion for a new trial because of the alleged insanity or lack of mental capacity of a juror during the trial in a capital case, there is a conflict of evidence as to whether the juror was on the one hand sane or of sufficient mental capacity to perform his duties intelligently during the entire trial; or on the other hand insane or of not sufficient mental capacity

to enable him to perform his duties intelligently, either during the whole or any part of the trial, as a matter of law, the burden of proof is upon the Commonwealth to establish beyond a reasonable doubt that the juror was sane or of sufficient mental capacity to enable him to perform his duties intelligently during the entire trial, including the investigation of the cause in court and the deliberations of the jury upon their verdict up to and including the time of the rendering of said verdict; and if the Commonwealth does not sustain this burden of proof, the defendant as a matter of law is entitled to a new trial.

6. Said Superior Court erred in refusing to rule that if a juror in a capital case is at any time during the introduction of evidence or the deliberations of the jury incapacitated by mental disease for the just performance of his duties; and his incompetency is not known to the parties or the court before or during the trial, a new trial must as a matter of law be granted to the defendant upon his motion for a new trial on said ground, as he has been deprived of his rights under Article XII of Part the First of the Constitution of the Commonwealth of Massachusetts and Article XIV of the Amendments to the Constitution of the United States.

15. Said Superior Court erred in refusing to rule that if the court finds that the defendant is otherwise entitled to a new trial, it is immaterial as a matter of law in a capital case whether the verdict rendered was proper or improper, as the defendant is prejudiced by the mere sitting upon the jury of a man mentally incapable of the just performance of his duties.

16. Said Superior Court erred in refusing to rule as requested by the defendant that if the court finds as a fact that upon all the evidence in the case there is reasonable doubt whether the juror White was incapacitated by mental disease for the just performance of his duties during the entire trial of the Commonwealth against the defendant, then as a matter of law the defendant is entitled to a new trial, as he has been deprived of his rights under Article XII of Part the First of the Constitution of the Commonwealth of Massachusetts and Article XIV of the Amendments to the Constitution of the United States.

17. Said Superior Court erred in refusing to rule as requested by the defendant that if the court finds upon all the evidence there is a reasonable doubt whether the juror White was incapacitated by mental disease for the just performance of his duties during the deliberations of the jury upon their verdict, at the trial of the Commonwealth against the defendant, then as a matter of law the defendant is entitled to a new trial as he has been deprived of his rights under Article XII of Part the First of the Constitution of the Commonwealth of Massachusetts and Article XIV of the Amendments to the Constitution of the United States.

18. Said Superior Court erred in refusing to rule as requested by the defendant, that if the court finds upon all the evidence there is a reasonable doubt as to whether the juror White was incapacitated by mental disease for the just performance of his duties during a part of the deliberations of the jury upon their verdict, then as a matter of law the defendant is entitled to a new trial as he has been deprived of his rights under Article XII of Part the First of the Constitution of the Commonwealth of Massachusetts and Article XIV of the Amendments to the Constitution of the United States.

19. Said Superior Court erred in refusing to rule as requested by the defendant, that if the court finds upon all the evidence in the case there is a reasonable doubt whether the juror White was incapacitated by mental disease for the just performance of his duties at the time that the verdict was rendered by the jury at the trial of the Commonwealth against the defendant, then as a matter of law the defendant is entitled to a new trial as he has been deprived of his rights under Article XII of Part the First of the Constitution of the Commonwealth of Massachusetts and Article XIV of the Amendments to the Constitution of the United States.

20. Said Superior Court erred in refusing to rule as requested by the defendant, that if the court finds upon all the evidence there is a reasonable doubt whether the juror White was incapacitated by mental disease for the just performance of his duties during a part of the time that evidence was being introduced, the arguments were being made and the charge of the

court was being given at the trial of the Commonwealth against the defendant, then as a matter of law the defendant is entitled to a new trial, as he has been deprived of his rights under Article XII of Part the First of the Constitution of the Commonwealth of Massachusetts and Article XIV of the Amendments to the Constitution of the United States.

21. Said Superior Court erred in refusing to rule as requested by the defendant, that if the court finds upon all the evidence in the case it is not proved beyond a reasonable doubt that the juror White was mentally capable of justly performing his duties during the entire trial of the Commonwealth against the defendant, then as a matter of law the defendant is entitled to a new trial as he has been deprived of his rights under Article XII of Part the First of the Constitution of the Commonwealth of Massachusetts and Article XIV of the Amendments to the Constitution of the United States.

22. Said Superior Court erred in refusing to rule as requested by the defendant, that if the court finds as a fact upon all the evidence that it is not proved beyond a reasonable doubt that the juror White was mentally capable of justly performing his duties during the deliberations of the jury upon their verdict at the trial of the Commonwealth against the defendant, then as a matter of law the defendant is entitled to a new trial as he has been deprived of his rights under Article XII of Part the First of the Constitution of the Commonwealth of Massachusetts and Article XIV of the Amendments to the Constitution of the United States.

23. Said Superior Court erred in refusing to rule as requested by the defendant, that if the court finds upon all the evidence in the case, it is not proved beyond a reasonable doubt that the juror White was mentally capable of justly performing his duties at the time the verdict was rendered by the jury at the trial of the Commonwealth against the defendant, then as a matter of law the defendant is entitled to a new trial as he has been deprived of his rights under Article XII of Part the First of Constitution of the Commonwealth of Massachusetts and Article XIV of the Amendments to the Constitution of the United States.

24. Said Superior Court erred in refusing to rule as requested by the defendant, that if the court finds upon all the evidence it is not proved beyond a reasonable doubt, that the juror White was mentally capable of justly performing his duties during a part of the time that evidence was being introduced, the arguments were being made and the charge of the court was being given at the trial of the Commonwealth against the defendant, then as a matter of law the defendant is entitled to a new trial as he has been deprived of his rights under Article XII of Part the First of the Constitution of the Commonwealth of Massachusetts and Article XIV of the Amendments to the Constitution of the United States.

25. Said Superior Court erred in refusing to rule as requested by the defendant, that having been furnished a list of qualified jurors, the law places the responsibility on the court of seeing to it that only such persons as are qualified shall sit. The prisoner may only interpose his objection by way of challenge, the number being fixed by statute. The fact that a juror otherwise qualified, is mentally disqualified, being brought to the attention of the court, it is the latter's duty to see that he is not placed upon the panel. If he is allowed to sit on the jury and during some part of the time he is so sitting he becomes mentally disqualified, it is the duty of the court to undo the work in which the juror participated and to declare it a mistrial.

29. Said Superior Court erred in overruling the motion for a new trial, in that the finding made by the court does not disclose any adequate grounds in law for refusing a new trial to the defendant and the court, by refusing to grant him a new trial upon the grounds set forth in its finding, has deprived him of the rights guaranteed to him under Article XII of Part the First of the Constitution of the Commonwealth of Massachusetts and Article XIV of the Amendments to the Constitution of the United States.

ARGUMENT.

I.

This Court has jurisdiction of the writ of error in the case at bar and a Federal question is squarely presented to this Court for its determination.

The jurisdiction of this Court of the writ of error in the case at bar cannot be questioned. In all of the material requests for rulings which were made to the trial court (Record pp. 66 to 75, inclusive) and in the exceptions to the action of the trial court in refusing to the prisoner a new trial, (Record, pp. 54, 55) which requests and exceptions form the basis of the assignments of error, in the case at bar, the prisoner specifically claimed his rights under the Fourteenth Amendment to the Constitution of the United States, and asserted that the action of the trial court in refusing him a new trial upon the facts and for the reasons stated in its finding, deprived him of the rights guaranteed to him under Article XIV of the Amendments to the Constitution of the United States. This Court said in *Keerl* v. *Montana*, 213 U. S. 135 at 137—

"The defendant during the trial, having specifically claimed that the action of the court in denying him the benefit of the plea of once in jeopardy operated to deprive him of his liberty without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States, our jurisdiction of the writ of error cannot be questioned."

citing *Beer Co.* vs. *Massachusetts*, 97 U. S. 25-30.
Bohanan vs. *Nebraska*, 118 U. S. 231.
Boyd vs. *Thayer*, 143 U. S. 135-161.

See also

Home for Incurables vs. *City of New York*, 187 U. S. 155 at 157.

Nor is this assertion by the prisoner that he was deprived of his rights under the Fourteenth Amendment of the Constitution of the United States, by the action of the trial court in refusing him a new trial, a bare assertion with no substantial foundation;

so that it can be claimed that although a Federal question purports to be presented upon the record, none is in fact presented.

It is undoubtedly true that this Court has held that whatever procedure a state may adopt in the administration of criminal law, is generally for each state to determine for itself, and this Court will not declare that such procedure does not constitute due process of law within the meaning of the Fourteenth Amendment, although it may be essentially different from the common law or from previous procedure in the same state. Thus, a decision of a state court that certain acts constitute an offence indictable at the common law, has been held not to contravene due process of law under the Fourteenth Amendment. *Howard* vs. *Fleming*, 191 U. S. 126. So also the sufficiency of the indictment to charge a specific offence.

Caldwell vs. *Texas*, 137 U. S. 692.
Leeper vs. *Texas*, 139 U. S. 462.
Davis vs. *Texas*, 139 U. S. 651.
In re Robertson, 156 U. S. 183.
Bergman vs. *Backer*, 157 U. S. 655.

This is also true as to the existence of defects in the indictment and their waiver by the defendant.

O' Neil vs. *Vermont*, 144 U. S. 323.

Nor is there any deprivation of due process of law by a trial and conviction before a judge *de facto* of a court *de jure*, the sentence pronounced being valid.

In re Manning, 139 U. S. 504.

A trial by a jury, one member of which is an alien, objection not having been taken in proper time under the statutes of the state, does not contravene due process of law under the Fourteenth Amendment. *Kohl* vs. *Lehlback*, 160 U. S. 293.

Nor is due process of law involved in the entry of a *nolle prosequi* as to those counts in an indictment of several counts, on which the jury were unable to reach an agreement. *Cross* vs. *North Carolina*, 132 U. S. 131.

So also the action of the state court in dismissing the defendant's appeal because of his escape from jail and failure to sur-

render himself according to the order of the court, within a certain time. *Allen* vs. *Georgia*, 166 U. S. 138.

Nor is due process of law affected by the action of the state appellate court in dimissing a writ of habeas corpus when the committing court had jurisdiction and the commitment was not void. *Tinsley* vs. *Anderson*, 171 U. S. 101.

The right to appeal from a judgment of conviction for crime is not a necessary element of due process of law.

Mc Kane vs. *Durston*, 153 U. S. 684.
Andrews vs. *Schwatz*, 156 U. S. 272.
Kohl vs. *Lehlback*, 160 U. S. 293.
Murphy vs. *Massachusetts*, 177 U. S. 155.
Duncan vs. *Missouri*, 152 U. S. 377.

It is also true that this Court will not interfere, even though this Court would have pursued a different course itself, than that pursued by the state court. *Allen* vs. *Georgia*, 166 U. S. 138 at 140.

This Court has definitely laid down the situation that must be presented, in order that it may be held that a state court has denied due process of law to a defendant. In *Allen* vs. *Georgia, ubi supra,* this Court said:

"To justify any interference upon our part it is necessary to show that the course pursued has deprived, or will deprive, the plaintiff in error of his life, liberty or property without due process of law. Without attempting to define exactly in what due process of law consists it is sufficient to say that, if the Supreme Court of a state has acted in consonance with the constitutional laws of a state and its own procedure it could only be in very exceptional circumstances that this Court would feel justified in saying that there had been a failure of due legal process. We might ourselves have pursued a different course in this case, but that is not the test. The plaintiff in error must have been deprived of one of those fundamental rights, the observance of which is indispensable to the liberty of the citizen to justify our interference."

It is the contention of the plaintiff in error in the case at bar that the trial court in refusing to set aside the verdict, under the circumstances disclosed in this record, has deprived him of "one

of those fundamental rights, the observance of which is indispensable to the liberty of the citizen." The mere fact that the Supreme Judicial Court of Massachusetts has ruled that the procedure of the trial court was proper and that its action in denying the prisoner a new trial, did not in any way deprive the prisoner of his rights under the Fourteenth Amendment to the Constitution of the United States, does not have the effect of a conclusive adjudication that due process of law within the meaning of the Fourteenth Amendment was followed; and that this Court must abide by the decision of the Supreme Judicial Court of Massachusetts. The defendant cannot be deprived of any of his fundamental rights by a form of procedure. The mere form of a procedure against him, even if he be admitted to defend, cannot convert the process used into due process of law if the necessary result be to deprive him of one of his fundamental rights. To say that a state court can make anything due process of law that it chooses to declare such, is to hold that the prohibition to the states in the Fourteenth Amendment that no citizen shall be deprived of his life, liberty or property without due process of law, is nugatory and of no avail. There is a limit beyond which state courts cannot go and that limit is reached when the state court undertakes by any form of procedure or any method whatever to deprive a citizen of the United States of his life, liberty or property, or any of the fundamental rights, the observance of which, are indispensable to his liberty under the guise or cloak of a method of procedure.

In *Fayerweather* vs. *Rich*, 195 U. S. 276 at 297 this Court quoted with approval the following language from the case of *Chicago, Burlington, etc., R.R.* vs. *Chicago*, 166 U. S. 226:—

"But a state may not by any of its agencies disregard the prohibitions of the Fourteenth Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet, it might be that its final action would be inconsistent with that amendment. In determining what is due process of law regard must be had to substance, not to form. This Court referring to the Fourteenth Amendment has said—' Can a state make anything due process of law which by its own legislation it chooses to declare such? To affirm this is to hold that the prohibition to the states is of no avail or has no application where the invasion of private

rights is affected under the forms of such legislation.' *Davidson* vs. *New Orleans*, 96 U. S. 97, 102. The same question could be propounded and the same answer should be made in reference to judicial proceedings inconsistent with the requirement of due process of law."

In *Chicago, Burlington, etc. R.R.* vs. *Chicago*, 166 U. S. 226 at 236 this Court further said:—

"The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation."

Although a state has full control over the procedure in its courts both in civil and criminal cases, such control is subject " to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution." *Brown* vs. *New Jersey*, 175 U. S. 172 at 175.

Due process of law, in the familiar language of Mr. Webster, means "The general law, a law which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial," so "that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society."

It is absolutely essential to due process of law that there should be an unquestionably competent tribunal before whom a citizen is tried and a tribunal that is unquestionably competent to render judgment upon him. If a citizen is denied that, of what value is the proceeding which may be instituted against him and in which he is a participant. In the case at bar the plaintiff in error contends that the verdict that was rendered against him upon which the judgment of death was pronounced, was rendered by a tribunal which contained among its members a person who was unqualified mentally to render a verdict. If that contention of the plaintiff in error be true, the whole proceeding in which he was compelled to appear before a tribunal, one of the members of which was mentally incompetent to hear and pass upon his defense was, in the language of this Court in *Chicago, Burlington, etc., R.R.* vs. *Chicago*, 166 U. S. 226 at 236, "a mockery of justice."

It is of course the law, as Cooley in his Treatise on Constitutional Limitations says relating to *ex post facto* laws:—

"But so far as mere modes of procedure are concerned the party has no more right in a criminal, than in a civil action to insist that his case shall be disposed of under the law in force when the act to be investigated is charged to have taken place. Remedies must always be under the control of the Legislature and it would create endless confusion in legal proceedings if every case was to be conducted only in accordance with the rules of practice and heard only by the courts in existence when its facts arose. The Legislature may abolish courts and create new ones and it may prescribe altogether different modes of procedure in its discretion, though it cannot lawfully, we think, in so doing, dispense with any of those substantial protections with which the existing law surrounds the person accused of crime." Chap. 9, Sixth Edition, page 326.

Thus the rules of evidence and all of those matters strictly regarding procedure may be changed at will, and a person may be tried in accordance with an entirely different procedure than that which existed at the time that his alleged crime was committed, provided that in such change no substantial or fundamental rights of the accused shall be taken away from him. It is significant that any change in the composition or number of the members of the tribunal before which he is to be tried has been held to be fundamental.

In *Thompson* vs. *Utah*, 170 U. S. 343, this Court held that the provision in the Constitution of the State of Utah providing for the trial of criminal cases, not capital, in courts of general jurisdiction by a jury composed of eight persons, took from the accused a substantial right, in that at the time of the commission of his crime Utah was a territory and he was entitled to be tried by a jury of twelve. This Court, therefore, on writ of error to the Supreme Court of the State of Utah reversed the judgment and remanded the cause for further proceedings not inconsistent with its opinion. It is therefore clear that any matter relating to the character of the tribunal before which a person is to be tried is one of substance and not one of form, and it must follow that the right of a person to have the benefit of presenting his defense before a tribunal unquestionably mentally competent to hear it, and to render a verdict thereon, is fundamental in character and cannot be taken away from him by any state

without violating the prohibition existing in the Fourteenth Amendment.

The prisoner contended before the trial court and now contends, that he never has had a trial before a tribunal mentally competent to hear him; that the refusal of the trial court to set aside the verdict and the imposition of the sentence of death by the trial court, based upon the verdict of a jury, one of the members of which was incompetent mentally to hear his defense and to pass judgment thereon, has deprived him of one of those fundamental rights, the observance of which is indispensable to the liberty of the citizen.

There is no opportunity in the case at bar, for the defendant in error to claim that there is any reason or ground why this Court is not called upon to decide the question that is squarely presented upon the record, to wit:—whether a tribunal containing a member concerning whose sanity there is a reasonable doubt is such a tribunal as satisfies due process of law within the meaning of the Fourteenth Amendment. The Supreme Judicial Court of Massachusetts met the question fairly, and decided that a citizen is obtaining all he is entitled to receive under that Amendment, if it simply appears that a juror is not affirmatively insane. In other words, although the Supreme Court of Massachusetts stated that "There can be no doubt that the defendant has a right to insist that the panel which tries him should consist of twelve sane jurors" it actually held that a defendant must be satisfied not only with a juror that is sane, but also with one concerning whose sanity there is a reasonable doubt; and that the only juror that is mentally disqualified from sitting upon a panel is a juror who is affirmatively insane. The Supreme Judicial Court of Massachusetts did not intimate that the question was not fairly raised before the trial court by the prisoner, and presented to it for its determination. In fact, in the opinion of the Supreme Judicial Court of Massachusetts the Court said (Record, p. 85):—

"If on an issue between the Commonwealth and the defendant as to the sanity of a juror during the trial and at the time of the rendering of the verdict, raised by the defendant, by motion for a new trial, the burden is, as the defendant in substance asked the Court to rule, on the Commonwealth to show beyond a reasonable doubt that the juror was sane, then clearly some of the rulings asked for—it is not necessary to decide which—should have been given and the defendant's exceptions should be sustained."

In other words, if the Supreme Judicial Court of Massachusetts had sustained the contention of the prisoner that reasonable doubt as to the sanity of a juror is a sufficient disqualification of the panel, that court would, as matter of law, have been compelled to grant a new trial.

No question can be raised with reference to the knowledge of the prisoner or his counsel of the mental unsoundness of the juror during the trial. It was specifically found by the trial court that neither the counsel for the defense nor the defendant had any reason to suppose that the mental condition of the juror was not sound until after the verdict. (Record, pp. 53, 54.) The Supreme Judicial Court in its opinion, (Page 85 of the Record) said:—

"It is practically agreed that neither the defendant nor his counsel had any knowledge of White's alleged insanity until after the verdict and therefore no question can arise as to the defendant's right to avail himself of the alleged insanity."

Nor did the trial court or the Supreme Judicial Court of Massachusetts attempt to dispose of the question on the ground that the refusal of a new trial was within the discretion of the court. The trial judges stated specifically in their findings of fact (Record, p. 54) that they denied the motion because they found that the juror Willis A. White was by a fair preponderance of all the evidence of sufficient mental capacity. (Record, p. 54.)

The Supreme Judicial Court of Massachusetts in its opinion (Record, p. 86) ruled as follows:

"We assume in favor of the defendant that the presiding judges overruled the motion for a new trial, not merely in the exercise of their discretion but because they found the facts which they did upon a fair preponderance of the evidence."

In other words, neither the trial court, nor the Supreme Judicial Court of Massachusetts, even intimated that where the mental qualifications of a juror are in question, a new trial can be refused to a defendant, if such juror appears to be mentally disqualified. It is of course clear, that if in the case at bar, this Court should rule that a tribunal concerning the sanity of a member of which there is a reasonable doubt, is not such a tribunal as satisfies due process of law, the prisoner as a matter of law and right is entitled to a new trial, and no court can

deny him one in the exercise of its discretion. Nor can this Court say that such denial, if made by a state court, is merely procedure and does not affect the vital and fundamental rights of the plaintiff in error. There is the clearest line of demarcation between the mental disqualification of a juror and the disqualifications and irregularities that have been declared by this Court to be within the power of the states to pass upon, and with which this Court will not interfere. Such a decision, therefore, as that of this Court in *Kohl* vs. *Lehlback*, 160 U. S. 293, has absolutely nothing to do with the question in the case at bar. In that case this Court cited with approval *Wassum* vs. *Feeney*, 121 Mass. 93, and to those cases may be added *Commonwealth* vs. *Wong Chung*, 186 Mass. 231, which collects all of the authorities and discusses exhaustively the question as to the disqualifications of jurors, which were the cause of challenge but which after verdict are the basis of a new trial, only within the discretion of the trial court. Those cases, as heretofore stated, have absolutely nothing to do with the question in the case at bar; and although *Wassum* vs. *Feeney, supra*, is the leading case in Massachusetts upon that subject, the Supreme Judicial Court of Massachusetts did not suggest that such a doctrine could be applied to the question raised by the prisoner. The reason is plain. It is to be observed that every one of the disqualifications referred to in *Commonwealth* vs. *Wong Chung, supra*, and in *Wassum* vs. *Feeney, supra*, as well as the disqualification of alienage in *Kohl* vs. *Lehlback, supra*, are disqualifications and objections extrinsic of, and not affecting the mental competency of a juror—such disqualifications for example as that he was a minor; that he was disqualified by interest or relation; not of the vicinage; alienage; previous conviction for crime, and irregularities of all kinds in impanelling the jury. It can well be conceived that if a person has been tried by a jury composed of twelve men who are admittedly, and beyond a reasonable doubt of sufficient mental capacity to justly perform their duties, the court may rule as a matter of law, that previous conviction for crime, infancy, alienage, the fact that the juror was not of the vicinage or that some irregularity was present in impanelling the jury, all of which were cause for challenge, should after verdict, be within the discretion of the court with reference to the granting of a new trial.

These objections are all of the same class although varying in degree, and the courts of the various states have not been unanimous, as the difference in degree has increased. The fact remains that the defendant has had a trial in all of these cases referred to, at the hands of twelve jurors whose mentality is admittedly sufficient to justly perform their duties. As this Court said in *Hayes* vs. *Missouri*, 120 U. S. 68 at 71:—

"The accused cannot complain if he is still tried by an impartial jury. He can demand nothing more."

In the case at bar the question raised by the prisoner as to the mental competency one of the members of the tribunal itself, strikes at the very foundations of due process of law and as heretofore stated, although the doctrine of *Wassum* vs. *Feeney*, *supra*, has long been the settled doctrine in Massachusetts with reference to disqualifications of a juror, the Supreme Judicial Court of Massachusetts in the case at bar did not even intimate that such a discussion was applicable to the question raised in this case; but treated the question as one of right, which if it existed, would compel the granting of a new trial. It may be added that in Massachusetts, as undoubtedly elsewhere, there are certain grounds for a new trial that require a new trial to be granted as matter of law and which if they exist do not permit the court to refuse a new trial as a matter of discretion. It has been held, for example, that any improper communication or intermeddling with the jury by a party in whose favor a verdict is rendered, or by an officer of the court, is conclusive ground, as a matter of law, for a new trial; and the Massachusetts Court does not inquire into the effect of the intermeddling nor permit the trial court to exercise any discretion about it. That situation existing, a new trial must be granted.

Read vs. *Cambridge*, 124 Mass. 567.
Sargent vs. *Roberts*, 1 Pickering 337.
Shea vs. *Lawrence*, 1 Allen 167.

So also where any documents or papers are introduced into the jury room other than exhibits, as for example where a volume of the General Statutes got into the jury room the Supreme Judicial Court of Massachusetts ruled that a new trial must be granted as a matter of law; on the ground that there was "reason to believe that the verdict may have been founded on erroneous views

of the law and that the action of the court if sanctioned by us would be a bad precedent."

Merrill vs. *Nary*, 10 Allen 16.

In that case the Massachusetts court did not consider whether the jurors were as a matter of fact influenced or confused by the presence with them of the volume of the general statutes, and did not discuss what effect actually was had upon the jury, but simply went upon the ground that where a possibility of harm exists, a new trial must as a matter of law be granted, and that there should be no inquiry as to what really happened. The court did not know whether the verdict was founded on erroneous views of the law or not, and did not inquire into it. It was sufficient that it might possibly have been.

In short, in the case at bar, as hereinbefore stated, the Supreme Judicial Court of Massachusetts met the issue presented by the plaintiff in error for the consideration of this Court squarely, and ruled (Record, p. 85) that if the plaintiff in error were correct, that his exceptions must be sustained. The contention of the plaintiff in error that he has never had a hearing before a tribunal competent mentally to hear and render a verdict against him, strikes at the very root of due process of law and if he is correct in his contention, he has in the language of this Court, been deprived of "one of those fundamental rights the observance of which is indispensable to the liberty of the citizen" and the interference of this Court is amply justified. It remains, therefore, solely to discuss, whether he has had a hearing before a tribunal that satisfies the demands of due process of law.

II.

A jury which contains a member concerning whose sanity there is a reasonable doubt, does not in a capital case, satisfy the demands of due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States.

The prisoner contends that he has not had a trial at the hands of a competent tribunal or such as satisfies due process of law as laid down in the Fourteenth Amendment to the Constitution

of the United States. At the outset the plaintiff in error desires to call this Court's attention to the evidence that was presented before the trial justices with reference to the mental condition of the juror Willis A. White.

The Facts as to Juror White's Mental Infirmity

In the first place, there is no question that the juror Willis A. White was insane. He was committed as an insane person to the Bloomingdale Asylum for the Insane at Worcester on Saturday, the 8th day of May, 1909, four days after the verdict of guilty was rendered against the prisoner, at noon of the 4th day of the same May (Record, p. 12). In the course of the hearings on the motion for a new trial, after a large amount of evidence had been introduced by the prisoner the Commonwealth admitted that the juror Willis A. White was not only insane upon the Saturday, four days after the verdict was rendered, but, also, upon the Thursday and Friday preceding (Record, p. 54). The only expert offered on behalf of the Commonwealth, Dr. Hosea M. Quinby, superintendent of the Bloomingdale Asylum, admitted that the juror Willis A. White was positively insane on Wednesday morning, May 5th, 1909, at about 8 o'clock (Record, p. 49). That was the time that juror White had his conversation with the witness Harriman (Record p. 14). Dr. Quinby admitted that when White was first committed to his care, he was of the opinion that the attack was an acute one, and that White would soon recover, but at the time of testifying, on October 9th, 1909, that White's condition was very grave, and that, in his opinion, he would probably not recover. (Record, p. 49). As the verdict was rendered against the prisoner at noon on May 4th, and as Dr. Quinby admitted that at 8 o'clock on the morning of May 5th, White was suffering from chronic insanity of an incurable character, from which he would never recover, the only question remaining is, what was his condition when the verdict was rendered, at 12 o'clock the day before, about twenty hours before the time when Dr. Quinby admitted that White was hopelessly and incurably insane? The presiding justices, as appears from their finding (Record, p. 54) were, as admitted by the Supreme Judicial Court of Massachusetts (Record, p. 85) in reasonable doubt as to White's mental condition at the time of the rendering of the verdict.

The question of the degree of proof required was sharply called to their attention, by appropriate requests for rulings, but they did not feel that they could find beyond a reasonable doubt that White was of sufficient mentality to justly perform his duties, and were in reasonable doubt as to his condition, finding merely that he was mentally capable of performing his duties only by a fair preponderance of the evidence. That the trial justices may well have had a reasonable doubt as to the sanity of the juror White, at the time of the rendition of the verdict, only twenty hours before it was admitted that he was hopelessly and incurably insane, will appear clear when this Court examines the record of the testimony taken at the various hearings on the motion for a new trial. In fact, the evidence warranted a finding that at the time of rendering the verdict the juror White was incurably and hopelessly insane. Various laymen, as well as physicians skilled in mental disorders, were called as witnesses, and also all of the members of the jury with the exception, of course, of the juror White. With regard to the testimony of the jurors the Court's attention is called to the conditions under which the jurors testified, as appears on page 54 of the record. The counsel for the prisoner asked instructions of the presiding justices as to what it was proper to do with reference to calling the jurors, other than juror White, to testify, and the presiding justices instructed counsel for the prisoner to call all of the jurors and put them on the stand, without any previous communication with them by anybody. This was done, and in considering the testimony of the jurors, therefore, this Court should bear in mind that they had had nothing to call the facts of the case to their minds from the time of the trial, to the time when they were respectively put upon the witness stand. It is significant, therefore, that without any opportunity to refresh their recollection, or to think of the matter at all, several of the jurors should have remembered facts of such significance as will be hereinafter pointed out. In addition to the oral testimony, certain letters written by the juror White during the trial were introduced in evidence and appear upon pages 63 to 66, inclusive of the record, and are referred to upon page 53 of the record. The presiding justices ruled that neither the counsel for the defence, nor the prisoner had reason to suppose until

after the verdict that the mental condition of the juror White was not sound. This was specifically so stated by the trial justices (Record, pp. 53 and 54) and by the Supreme Judicial Court in its opinion (Record, p. 85).

There was evidence that Oscar R. White, the brother of Willis A. White, the juror, was committed to the Insane Hospital at Augusta, Maine, and was an inmate there for some time, and finally was committed to the Insane Hospital at Bangor, Maine, and died there. The record of the institution referring to Oscar R. White stated that insanity was hereditary on his father's side and that both his grandfather, Peletiah, and his uncle, Daniel, committed suicide (Record, p. 13.) There was, therefore, evidence which was uncontroverted tending to show a predisposition to insanity on the part of the juror White of a hereditary character. With regard to the period of the life of the juror White prior to the time that he was sworn as a juror, there was testimony by the witnesses Dakin (Record, pp. 13 and 14), Ray (Record, p. 15), Perry (Record, pp. 16, 17), Hastings (Record, p. 19), Champagne (Record, p. 20), Dr. Rich, his family physician up to a year and a half prior to the trial (Record, pp. 20 to 23, inclusive), Shirland (Record, p. 25), Temple (Record, pp. 25 and 26), Baldwin (Record, pp. 26 and 27), Dr. Hamblen, who had treated the family of juror White to some extent (Record, p. 51), Coughlan (Record, p. 52), Connors (Record, p. 52), and Kitchen (Record, pp. 52 and 53). The substance of their testimony was to the effect that juror White for many years prior to the time that he was drawn as a juror was peculiar, loud spoken, and of an unstable mental condition. As to whether he was insane prior to the time that he was sworn as a juror, the testimony was conflicting. Dr. Rich, who had been his family physician up to within a year and a half of the trial and had known him for twenty years, testified that White was not a normal man, and, in his opinion, was not sane at the time he ceased to be his family physician. It is clear upon the evidence with reference to juror White's life prior to the time that he was sworn as a juror, that it would have to be found as a fact that he was at least unstable in mental condition, and if not insane, of such a mental condition and of such a mental makeup that, together with his hereditary predisposition towards insanity and the blow upon the head, which

he had received some years before (Record, p. 20), mental break-down during confinement as a juror, would be a natural and not improbable result. Dr. Bigelow T. Sanborn, an expert in diseases of the brain and insanity, and for forty-three years superintendent of, and connected with, the State Asylum at Augusta, Maine, where Oscar White, the brother of the juror, had been an inmate, testified that the juror White was unquestionably insane before the trial commenced, and was in such a condition that he should have been committed to an insane asylum (Record, pp. 38, 39 and 41).

Whatever difference of opinion might exist, however, upon the evidence with reference to juror White's life previous to the time that he was sworn in as a juror, there can be absolutely no question as to what ought to be found as a fact with reference to his mental condition, for a large portion of the time while he was engaged in his duties as a juror after he was sworn, up to and including the day of the verdict. Upon that period, which, of course, is the vital period, we have the testimony of the jurors themselves, which appears in the record (pages 27 to 37, inclusive), the testimony of Dr. William McDonald, an expert alienist, present at the trial, and who had an opportunity to observe juror White during the trial and of examining him at the Worcester Insane Hospital subsequent thereto (Record, pp. 41 to 45), the witness Herring, a deputy sheriff (Record, p. 37), together with the opinions of Drs. McDonald, Jelly and Sanborn, as well as Dr. Quinby, appearing on pages 38 to 51, inclusive, of the record, and the letters written by juror White during the trial which appear upon pages 63 to 66, inclusive, of the record. The jurors, as heretofore stated, were by instructions of the presiding justices, called to testify without any communication with anyone or any opportunity to refresh their recollection. The testimony of several of the jurors, to wit, juror Howard (Record, p. 27), Cullen (Record, p. 29), Vaughn (Record, p. 29), Smallwood (Record, p. 33), Felton (Record, p. 34), Bryn (Record, p. 35), and Hurley (Record, p. 36), was negative in character in as much as they were not, in their service, drawn into intimate relations with the juror White and had no occasion to, and did not, observe what the other jurors did observe, so that their testimony is of no value in assisting the Court because they did not have the opportunity of obser-

vation possessed by the others. The attention of the Court is called to the testimony of jurors Culhane (Record, pp. 28 and 29), Stafford (Record, pp. 30 and 31), Sheehan (Record, pp. 32 and 33), and the testimony of Dr. McDonald (Record, pp. 41 to 45) where he stated what he observed himself of the juror White during the trial.

The only testimony in the case with regard to what occurred during the time that juror White was serving upon the panel necessarily came from the jurors themselves in addition to the letters which are found on pages 63 to 66 of the record. The juror Culhane (Record, p. 28) testified that two or three days after the trial began he noticed that White was acting differently from the other jurors; his actions were different from the other men; he was flighty. In conversation he would get huffy with what was being said, and then he would immediately apologize. The witness noticed this two or three times a day. White was constantly writing letters whenever he got a minute's rest. He would write for awhile and then run upstairs and then run right back again, and this is how the witness made up his mind that there was something wrong with him. At the table he would object to part of his meals and call for other food instead; push the dishes to one side and call for something else. This happened frequently. During the trolley ride on the Sunday previous to the verdict when the jury had stopped and turned back, there were some ladies on the side of the street and White stood up in the car and waved to them. The sheriff reprimanded him and the witness said that was right, and White immediately jumped up and asked the witness what right he had to interfere. On Monday morning after the ride White talked with the sheriff and wanted to know what his rights were, and the sheriff told him he would be all right and talked with him and quieted him, and then immediately White jumped right back and threw himself on his knees and apologized to the witness; at dinner on the day of the Jordan verdict White read aloud a letter which he had written to his wife concerning the trolley ride on the Sunday previous.

The juror Thomas F. Stafford, testified (Record, pp. 30, 31) that he noticed that White's conduct and manner were different from the other jurors; that the first he noticed was about his letter writing; that he wrote a great many and wrote them spasmodi-

cally; that the first time he noticed this particularly, was about the fourth or fifth day of the trial; that he noticed White got hysterical one day at the table and cried; that White wanted to know who Mr. Higgins, the district attorney, was working for, whether it was for Jordan or against him; that he had a habit of calling the other jurors "brother," and one day he said to the witness, "Would you believe me that I am all mixed up the last couple of days, I don't know how this thing has been going on, but everything is all right now, it is all right now"; that at the dinner table White was incessantly talking; that he heard White claim that his food was doped; that he heard him make this claim to two or three of the other jurors; that he heard him make it to the high sheriff and to the deputies; that he saw him refuse to eat the regular food and call for other food; that he noticed White act very queerly during the last week; that he noticed him in the juryroom put his hands across his breast and rock, though seated in a straight chair; that during the last of the trial White did not know what he was doing; that during the progress of the trial White acted in a very peculiar manner; that the witness thought that he acted queerly about a week before the end of the trial; that up to a certain time White seemed to understand the proceedings, but that he did not seem to understand the proceedings about a week before the end of the trial; that the first thing that led the witness to think this, was that White did not know whether the district attorney was working for Jordan or against him; that White was all mixed up and did not know whether the district attorney was for Jordan or prosecuting him, whether he was advocating his case or prosecuting his case; that the witness called the attention of three or four of the different jurors to that fact at that time; that at the last end of the trial the witness thought that White did not know what he was doing; that the reason why he thought he did not know what he was doing was the way White acted with reference to the district attorney and with reference to refusing to eat the food that the jury all ate, and with reference to his letter writing in addition to the acts of White on the last trolley trip; that the jury rode about thirty miles on that day, and that witness did not think that White sat down five out of the thirty; that he was standing up hanging on to the strap when there was plenty of room for him to sit down; that the

witness thought that White did not know what he was doing at the time; that White did not discuss the evidence any.

Juror Timothy F. Sheehan testified (Record, pp. 32, 33), that he noticed that White was different from the other jurors in his conduct and manner; that about the eighth or ninth day of the trial White said to the witness, "Mr. Sheehan, I think they are putting something in our food down there, I have been up and down all night." The witness said, "Of course they are, they are feeding us so high they have to put something in it to keep us down." The witness saw that White was serious and dropped it right away. The witness heard White later talking to the deputy sheriffs about it. After that, witness heard him say that he wouldn't eat any more food but what he knew what it was. When they went to breakfast he called for eggs and a glass to break them in; that White seemed to be nervous all the time, moving around and was writing letters; that he would write awhile and then he would get up and go into another room and sit and talk and go down stairs, and while he was gone his letters would be lying on the table exposed so that anyone could read them; that he had read in the presence of the jurors a letter which he had written to his wife concerning the trolley ride; that on the day of the trolley ride he was nervous and stood up most of the way although there was plenty of room to sit down; and (Record, p. 33) when the witness saw White eating eggs at the time when other members of the panel were eating meat, the eggs were served in the shell and White himself broke them; that White was all in earnest when he spoke to the witness about their putting something in his food.

Dr. McDonald testified (Record. pp. 43, 44, 45) that when he was giving the testimony at the trial, in regard to the homicide as Jordan described it to him, the things he did with the body; the witness's attention was struck in looking at the jury at that time by White suddenly laughing during the gruesome details; that White had a way of folding his arms and rocking back and forth and leaning back, and at that time the witness was rather surprised to see White laugh because the details were such as not to seem to witness to suggest laughter. The particular thing that attracted the witness's attention was White's extreme listlessness, his pressure towards activity, that the inner unrest was extremely suggestive; that White seemed to

be unable to sit still a single second, he was leaning forward, leaning to that way here, then leaning back in his chair and constantly in motion, constantly rocking, his face—the expression on his face was to the witness, very expressive—a constant change of expression; it seemed to the witness that the man was in an extremely unstable condition.

In connection with the above evidence the Court's attention is called to the fact again, that the jurors were called and testified under instructions from the presiding justices and nobody was permitted to talk with them with reference to their testimony before they took the stand. It is extremely significant, therefore, that the details that were testified to by several of the jurors, each of whom had participated in rendering the verdict of guilty, should have been such as to have clearly indicated White's insanity during a portion of the time at least, that he was sitting as a juror. It is of absolutely no significance that other jurors did not notice these things because their attention was not called to the matter at the time of the occurrences. It is perfectly clear that White's conduct while a member of the panel indicated without question, that his mentality was impaired. In the first place, he thought that his food was drugged; he thought that somebody was putting something in his food. He, therefore, called for uncracked eggs (Record, p. 33.) This is one of the most significant things that he did, as one of the most common beliefs of insane persons is that their food is tampered with and that they can obviate that trouble by calling for eggs in the shell. (See testimony of Dr. Sanborn, Record, p. 39). It is clear that he was suffering from an insane delusion, that somebody was tampering with his food. It is immaterial, as Dr. Jelly pointed out, (Record, pp. 45, 46) whether the delusion came from within or was caused by some outside suggestion, as his mind must have been in an abnormal condition to receive and harbor the delusion, and make it such. His pressure toward activity, his constant movement, his rocking back and forth in a straight chair, his laughter in the court room at the detailing by Dr. McDonald of the gruesome details of the testimony, all are extremely significant, and are absolutely the very symptoms of the manic-depressive insanity from which he was suffering. His stubbornness and quarrelling with the deputies and juror Culhane are also extremely significant. The

jurors had no means of determining what kind of a memory he had because he did not discuss the evidence. (Record, p. 31.)

Juror Stafford (Record, p. 31) stated that during the last of the trial White did not know what he was doing. The question that White asked juror Stafford with reference to which he testified on pages 30 and 31 of the record as to whether the district attorney was prosecuting Jordan or was defending him, together with the situation in which at that time he was, being "all mixed up" as juror Stafford said (Record p. 31) shows conclusively that juror White had no grasp of the situation and did not know what he was doing.

In connection with the testimony of the jurors the letters that juror White wrote during the trial are extremely significant. On page 63 of the Record appears the letter that he wrote to his wife on April 28, six days before the rendering of the verdict, in which he asked her to send a bleeding "phelm" so that he could explain blood spurting to his brother jurors when the time came for discussion, cautioning her not to "lisp to anyone about this letter or the sending of the 'phelm'" that he wanted the "phelm" to help him explain to his brother jurors the reason why he had come to his opinion about the case. He ends the letter by a postscript "Hide this letter." It is well known that secrecy or stealth is one of the most significant attributes of an insane person. The letter (Exhibit C) that he wrote to Dr. Hamblen, which appears on page 64 of the Record, is of the same nature. He asks the doctor to send him the points of temperature of a person in perfect health and one at the point of death, because some statements made by an expert on the stand seemed absurd to Mr. White. At the end of the letter appears this significant language, "Please burn this letter as soon as contents are noted." This letter was written April 30th, four days before the date of the verdict. Secrecy is again indicated. The letter appearing on pages 64 and 65 of the Record that he wrote to his wife on April 30th, four days before the date of the verdict, contains a disjointed story of various things connected with the trial, and on the first line of page 65 is the significant language, "Please burn this whole business when read." Again we have secrecy with no excuse for it. With regard to the letter (Exhibit E) on page 65 of the Record to Mr. Kitchen, it does not appear when that letter was written,

as it is simply dated "April, 1909," and there is no evidence with reference to that fact.

All of the above evidence with reference to the actions of the juror White during the time that he was serving upon the jury are uncontradicted and show as has been hereinbefore pointed out, all of the characteristics in his conduct, that are present in a person suffering from manic-depressive insanity. In this connection, the Court's attention is called to the testimony of the witness Herring, a deputy sheriff, in attendance at the jail in East Cambridge, who testified (Record, pp. 37 and 38) that towards five o'clock in the afternoon, three or four hours after the verdict was rendered on the same day, Tuesday, May 4th, juror White called at the jail and asked to see "John"; that his talk during his call at the jail was like an intoxicated man, and the evidence disclosed that White was not a drinking man (Record, p. 16).

As hereinbefore stated, the Commonwealth admitted that the juror White was insane, not only on Saturday following the Tuesday on which the verdict was rendered, when he was committed to the asylum, but upon the Thursday and Friday following the verdict, and, as hereinbefore stated, Dr. Quinby, the expert for the Commonwealth, admitted that he was positively insane with chronic insanity from which he would never recover at 8 o'clock in the morning of Wednesday, the next day after the verdict was rendered at about noon. The evidence with regard to those days has therefore not been discussed in this brief, but the Court's attention is called to the fact that his actions were precisely the same as they were during the time that he was sitting on the jury, only more exaggerated.

Dr. Quinby, the expert for the government, stated (Record, p. 48) that White was suffering at the time of his commitment from chronic Bright's disease of the kidneys with heart complications; that Bright's disease would be a contributing cause; that Bright's disease, worry over financial matters, and the strain and stress of the trial would be an adequate cause for the breaking of White's mind in the form of reaction after the trial was over; that such an attack might come on very suddenly, or it might be weeks coming on; but Dr. Quinby admitted (Record, p. 49) that in all his experience he had never known more than two or three cases where men had ever become chronically insane over night, and it was admitted that the juror

White was chronically and hopelessly insane at 8 o'clock, on Wednesday morning, the day after the verdict. Dr. Quinby had been superintendent of the Bloomingdale Asylum for many years. It is submitted that on this testimony alone no court could find that the juror White was mentally capable of justly performing his duties, during the deliberations of the jury and at the time the verdict was rendered, because when it is admitted that White was chronically and hopelessly insane on Wednesday morning at 8 o'clock from a complication of causes, one of which was chronic Bright's disease, and that in all his experience Dr. Quinby had never known but two or three cases where men had become chronically insane over night, it is clear that the condition of juror White's mind at about 12 o'clock, when the verdict was rendered, only twenty hours from the time that he was admittedly hopelessly and chronically insane for the reasons stated by Dr. Quinby, must have been such as to render him unable to properly perform his duties.

It is no wonder that the trial justices were in reasonable doubt as to the sanity of the juror White at the time of the rendition of the verdict.

Is it safe on the testimony of the government alone to permit that verdict when rendered by a panel containing a juror whose mental condition was as above indicated, to stand? Is it safe, not from the standpoint of the prisoner alone, but for the protection of the public and the protection of citizens who may be tried for murder in the future? This is doubly true when to the testimony already commented upon is added the opinions of such eminent alienists as Dr. George F. Jelly, an alienist of long standing, who had the opportunity of examining White at the Bloomingdale hospital, Dr. William McDonald, of the Butler Asylum for the Insane, who was present at the trial and had an opportunity to observe juror White and who examined him at the Bloomingdale Insane Hospital, and Dr. Bigelow T. Sanborn, for forty-three years superintendent of and connected with the State Asylum at Augusta, Maine, who was familiar with the family history of juror White, who had had his brother as an inmate in his hospital and who also had seen White at the Bloomingdale Asylum.

Dr. Sanborn testified that he had no hesitation in pronouncing White an insane man at the time of the rendition of the verdict

on the fourth day of May, 1909, and previously thereto (Record, pp. 38 and 39).

Dr. McDonald testified that in his opinion on the day preceding the verdict the juror White was insane and on the day of the rendering of the verdict, and, in his opinion, thereafter (Record, p. 41).

Dr. Jelly testified (Record, p. 45 that) the juror White was insane at the time of the rendering of the verdict in the Jordan case on May 4th, and must have been so, from the history, previous to that time. Dr. Jelly said (Record, p. 45) "I base my opinion upon the fact that he is a very unstable man, subject to periods of elation and depression, boisterous at times, and depressed at times, and from the development of certain delusions about his food, and other suspicions, that he said that his food had been tampered with, and he said that he had not proper care, had not been treated properly—those were his words, I think—while deliberating with the jury; that his food was tampered with; that there were things put in it; that he was doped, or some such word as that, which injured his health, and that then afterwards, the day after, he said that Jordan was innocent, but that they were obliged to convict him. Those expressions and his general tendency, with the tendency in the family, to insanity, with what I saw at the Worcester Hospital, from the history given there, makes me feel that Willis White was insane at the time he rendered the verdict and he has been insane ever since."

Dr. Jelly, on pages 45 and 46, states exactly the significance of the insane delusion possessed by juror White during the time of the trial, and that it makes no difference whether the suggestion of tampering came from within or was given to him by others. It was enough that his mind was in such an abnormal condition as to receive it.

Dr. Quinby, it appears (Record, pp. 48, 49, 50, 51), did not disagree with Dr. Jelly as to this, but felt that notwithstanding that all of the things that were done by White during the trial and that happened during the trial were consistent with manic-depressive insanity in ever increasing degree, that he would have to wait before he found that he was positively insane until 8 o'clock the next morning when White stated, as indicated on page 14 of the Record, precisely what he did during the trial

with regard to refusing food and with regard to the tampering with the same, but added the reason that the tampering was for the puprose of taking away his mind so that he would decide the way it was decided by his fellow jurors. In other words, Dr. Quinby had to wait until White told him he was insane and said why he thought his food was being tampered with, when the facts with reference to his beliefs as to the tampering with his food existed during the trial precisely as White afterwards stated that they existed. If White had never happened to say why he thought his food was being tampered with, if he had simply thought so and acted upon his ideas, it would appear that Dr. Quinby could never find that he was insane. The fact that during the trial he did refuse food, that he did think that his food was being tampered with for a purpose, that he had that delusion and acted on it, as is clearly pointed out by Dr. Jelly is conclusive as to the presence of the same. It is absolutely immaterial when White said anything about the matter when it is a fact that during the trial he acted precisely as he said he did afterwards.

The prisoner desires to call the Court's attention to the questions of one of the presiding Justices to Dr. Jelly, an eminent alienist of long standing, and the answers thereto, appearing on pages 46 and 47 of the Record.

"*Q.* (By Stevens, J.) Doctor, are you satisfied his mental condition was such as to affect his ability to intelligently consider the evidence in the case? *A.* I do, sir; I do feel so.

Q. Do you think he was insane at the time—are you satisfied he was insane at the time he was sworn in as a juror? *A.* I don't dare to go quite so far as that, your Honor. I think he was an unstable man, not a normal man.

Q. Do you think he ought to have been committed to an asylum before the trial? *A.* I have no evidence to speak of that. I think he was an abnornal man and an unstable man.

Q. I mean from the evidence you have heard are you satisfied he ought to have been committed to an insane asylum before the trial? *A.* I would not say that without further evidence."

Upon all the evidence, therefore, the prisoner contends that whatever difference of opinion may exist as to what the juror White's mental condition was prior to the time he was sworn in as a juror, that it is absolutely clear that at some time during that trial and before the time of rendering the verdict, the juror White was suffering from progressive chronic manic-depressive insanity to such a degree that he was not of sufficient mental capacity to intelligently consider the evidence, appreciate the arguments of counsel, the rulings of law, the charge of the court, and to arrive at a rational conclusion; and that, therefore, the trial justices were well warranted in having a serious and reasonable doubt as to the sanity of the juror White while serving upon the panel that convicted the prisoner. Indeed the only wonder is how the trial justices could have on this evidence, possibly failed to find the juror White during said period, clearly and positively insane.

Such being the fact as to the mental condition of the juror White, there arises for discussion the attitude of the Massachusetts court upon the motion filed by the prisoner.

The Opinion of the State Court.

The portion of the opinion of the Supreme Judicial Court of Massachusetts dealing with the question that is before this Court appears upon pages 85 and 86 of the Record. The Massachusetts Supreme Court first concedes that:—

"If on an issue between the Commonwealth and the defendant as to the sanity of a juror during the trial, and at the time of the rendering of the verdict, raised by the defendant by a motion for a new trial the burden is, as the defendant in substance asked the court to rule, on the Commonwealth, to show beyond a reasonable doubt that the juror was sane, then clearly some of the rulings asked for—it is not necessary to decide which—should have been given and the defendant's exceptions should be sustained."

In other words, the Massachusetts Supreme Court says that if the contention of the prisoner with reference to the question before this Court is correct that the verdict rendered against him should be set aside and a new trial granted. The court then goes on to say—

"There can be no doubt that the defendant has a right to

insist that the panel which tries him should consist of twelve sane jurors."

This, it is submitted, is an absolutely correct statement both of the law and of the prisoner's rights under the Fourteenth Amendment to the Constitution of the United States, assuming that the court means twelve unquestionably sane jurors.

The court then says:—

"And there can be no doubt that if without his knowledge or that of his counsel one of the jurors to whom his case was submitted, was insane during the trial and at the time when the verdict was rendered, he has not had such a trial as is guaranteed to him by the Constitution of this Commonwealth and by the Constitution of the United States."

The Massachusetts Supreme Court thus concedes that if a juryman is insane, that the jury is not such a one as is guaranteed to a citizen of the United States under the Fourteenth Amendment to the Constitution; and that if it affirmatively appears that a juryman is insane, the defendant is entitled to have a verdict against him by that jury set aside, as such is not a tribunal that satisfies due process of law. This is, as the Supreme Court of Massachusetts states, upon the assumption that the insanity of the juror is unknown to the defendant or his counsel. That the mental incapacity of the juror White was unknown to the prisoner or his counsel is conceded, both by the trial justices (Record, pp. 53, 54) and the Supreme Judicial Court (Record, p. 85) where the latter says:—

"It is practically agreed that neither the defendant nor his counsel had any knowledge of White's alleged insanity until after the verdict and therefore no question can arise as to the defendant's right to avail himself of the alleged insanity."

It is the prisoner's contention that this is immaterial, but as the court has stated it there can be no controversy concerning it.

The position of the Supreme Judicial Court of Massachusetts plainly is, that if one of the jurors is affirmatively insane, the panel upon which he is sitting is not a jury that satisfies the due process clause of the Fourteenth Amendment. The Massachusetts court goes further and says that the prisoner has a right to insist that the panel which tries him shall consist of

twelve sane jurors; but refuses him a new trial solely upon the ground that it does not affirmatively appear that the juror White was insane. The court in discussing the reason for this proposition says that:—

"Ordinarily the party asserting the affirmative of an issue has the burden of proof, and we do not see why the ordinary rule should not apply here. The defendant asserts that one of the jurors was insane during the trial and when the verdict was rendered, and that therefore the verdict should be set aside. It is for him to prove what he says, not beyond a reasonable doubt, but by a fair preponderance of the whole testimony."

In other words, the court says that the question whether a person serving on a jury in a capital case is mentally competent is the same kind of question as exists in an ordinary civil case. The court then goes on to say:—

"The inquiry into the sanity or insanity of a juror is not an investigation into an alleged crime, and has none of the elements of such an investigation; and the rules relating to criminal practice and pleading are therefore in no way applicable to it; nor is the sanity or competency of a juror in any way involved in the question of the defendant's guilt or innocence. It is not in the remotest degree an issue in the case. If a question is raised as to the defendant's sanity, that becomes thereby an issue, and the burden is on the Commonwealth to show that he was sane, but that has nothing to do with the question whether a juror was sane or insane during the trial."

The court here states specifically, that the investigation into the sanity of one of the members of a tribunal trying a citizen of the United States for his life, is not at all connected with the investigation of the crime, and therefore the analogy of a criminal proceeding has no application to it. The court proceeds:—

"The government was and is no more responsible for the presence upon the panel of the juror White than the defendant or the court. As finally constituted the jury was the tribunal appointed by law for the trial of the case. Its members were selected in the manner provided by law from the body of the citizens of the county and in case a question arose during or after the trial as to the sanity or insanity of one of them the burden was upon the party alleging the insanity to prove it by a fair preponderance of the evidence, not upon the Commonwealth to show that the juror was sane."

This is the fundamental reason given by the court for its position with regard to the nature of the inquiry into the sanity of the juror. The court holds that the government through its constituted authorities has no obligation placed upon it by the constitution to see to it that rights of the citizen charged with crime are safeguarded, but that if a question arises as to the mental competency of one of the tribunal trying the citizen for his life, this is a matter in which the government has no interest whatever, and that if the prisoner does not show affirmatively that the juryman in question was insane, he is not harmed and must take the consequences of the verdict. In other words, the defendant is not entitled to insist, as the court stated in the previous paragraph, that the panel who tries him shall consist of twelve sane jurors. He is simply entitled to insist that the jury shall consist of twelve jurors who are not insane, and unless it affirmatively appears that they are insane he is receiving everything that he is entitled to demand. The Supreme Judicial Court of Massachusetts does not cite a single authority in support of this proposition and so far as it appears, there is no authority upon this precise point.

The true doctrine is that the burden of conserving the constitutional rights of the citizen rests on the State.

It is however, submitted that the fundamental proposition of constitutional law which controls the principles involved in the case at bar, has long since been well settled and the error into which the Supreme Judicial Court of Massachusetts was led was in not applying that proposition to the case before it. It is not true that the inquiry into the mental capacity of the juror is an issue between the Commonwealth and the defendant; nor is it true that the defendant, by suggesting in the form of a motion for a new trial that he has not been tried by a tribunal that is competent mentally, has assumed the burden of proving anything. The inquiry is one that is undertaken by the government at the prisoner's suggestion, to determine simply, the question of the juror's competency and is in its nature an inquiry *in rem*. It is unlike either the proceeding itself, in which the defendant is tried, or a civil action, both of which the court discussed in connection with it. The prisoner having suggested

by an appropriate proceeding, in this case by a motion to set aside the verdict and for a new trial, that the tribunal which passed upon his case was not such as due process of law required, it was clearly the duty of the state through its judicial machinery to inquire into that fact and to determine what the situation was. If it appeared as a result of the inquiry that due process of law had not been observed the court should have declared the proceedings a mistrial. In the case at bar the situation with reference to the mental condition of the juror was disclosed to be such that the trial judges were in reasonable doubt as to the sanity of the juror. If it is true that the prisoner was, as the Supreme Judicial Court stated, entitled to insist that he be tried by a jury of twelve sane jurors, that right was not satisfied when it appeared that one of them was a man concerning whose sanity there was a reasonable doubt.

It is not true, as the court stated in its opinion, that the government was not in any way interested in the situation. The only method by virtue of which the constitutional rights of the prisoner could be preserved and guaranteed to him, was by virtue of the power vested in the Commonwealth through its constituted officers, to summon a jury for his trial. It did not, as the evidence discloses, furnish a jury consisting of twelve unquestionably sane men. Upon the jury which was furnished was a man concerning whose sanity there was a reasonable doubt. The prisoner had no power to prevent such a situation; the proceeding was, so far as he was concerned, against his will, and the only right that was possessed by him was the right to challenge, which it appears from the evidence in the case at bar, would not have been efficacious.

It is submitted that the least that should be accorded to a citizen on trial for his life is that the tribunal that tries him shall be unquestionably sane. The Massachusetts court holds to the proposition, that a citizen of the United States is receiving all that he is entitled to receive under the Fourteenth Amendment, when he is given a panel of any sort of mentality short of actual affirmative insanity. This doctrine, if correct, would afford absolutely no assurance to a citizen of the United States that he would receive a trial at the hands of a competent tribunal, which is the very essence of due process of law.

By the terms of the due process clause of the Fourteenth Amendment to the Constitution of the United States, a state is prohibited from depriving any person of life, liberty or property without due process of law. The duty of seeing to it in the first instance, that due process of law is observed in the trial of the citizen devolves, necessarily, upon the state. The conduct of the courts and the procedure therein is placed exclusively in the power of the state, and to the state is entrusted the duty of seeing to it that the constitutional rights of citizens are retained for them. *Allen* vs. *Georgia*, 166 U. S. 138 at 140. *Chicago, etc., R.R.* vs. *Chicago*, 166 U. S. 226 at pp. 234 and 235. *Thompson* vs. *Utah*, 170 U. S. 343 at pp. 350 to 355. The only court that has jursidiction to determine whether a state has failed in this duty, is this Court; and it is for this Court alone to establish what duties devolve upon the states and whether they have failed in the performance of such duties. The Commonwealth of Massachusetts is brought before the bar of this Court and charged with being about to deprive a citizen of the United States of his life without due process of law. The highest court of that Commonwealth has held (Record, p. 85) that the state of Massachusetts through its constituted officers, was no more responsible for the presence upon the panel, of the juror White, than the defendant or the court itself; and that no duty whatever devolved upon the state to see to it that the constitutional rights of the prisoner in this regard were observed, even after the prisoner suggested to it that his constitutional rights had been invaded.

If the defendant in error refuses to assume any responsibility in the matter, it is for this Court under the powers possessed by it to compel the state to assume that responsibility and to set aside the proceedings in which the constitutional rights of the prisoner were not preserved.

The true doctrine is laid down by Christiancy, J., in *Hill* vs. *The People*, 16 Michigan, 351 at 357, in which opinion Mr. Justice Cooley, one of the most eminent authorities upon constitutional law concurred:—

"The true theory, we think, is that the people in their political or sovereign capacity assume to provide by law the proper tribunals and modes of trials for offences, without consulting the wishes of the defendant as such; and upon them

therefore devolves the responsibility not only of enacting such laws, but of carrying them into effect, by furnishing the tribunals, the panels of jurors and other safeguards for his trial in accordance with the constitution which secures his rights. The government, the officers of the law, bring the jurors into the box. He has no control over the matter, who shall be summoned or compose the panel upon which he may exercise the right of challenge."

In *West Virginia* vs. *Cartwright*, 20 W. Va., 32 at 45, the court said:—

"The state had charge of the prisoner and it was her duty under the law to see that he had a fair and impartial trial and so far as practicable by the most guarded caution to allow no suspicion of unfairness. Although there might be and perhaps was no tampering with the jury in this case, yet in a free country it is better that the inconvenience of a new trial should be incurred than that just principles should be disregarded and a suspicion remain that a citizen has been convicted without a fair and impartial trial. *The law, as we have heretofore declared, casts the burden of removing all suspicion of unfairness upon the state* and we are unable to say in this case that that suspicion has been removed to our entire satisfaction or *beyond a reasonable doubt;* we are therefore of opinion that the Circuit Court of Marion County erred in overruling the motion of the defendant to set aside the verdict of the jury and grant him a new trial."

In *State* vs. *Prescott*, 7 N. H. 287 at 292, the court said:—

"Where there has been an improper separation of the jury during the trial, if the verdict is against the prisoner he is entitled to the benefit of the presumption that the irregularity has been prejudicial to him; and it is incumbent upon the government to show, *and that beyond a reasonable doubt*, that the prisoner has suffered no injury by the departure from the forms ordinarily preserved in the administration of justice.

The prisoner is in such a case entitled as a matter of right to require in the first instance a compliance with the ordinary forms provided by the law to secure to him a fair and impartial trial, and if the guards provided for his security are neglected or disregarded, he is at least entitled to require at the hands of the government satisfactory evidence that he has not received detriment by reason of such neglect; and is not to be put to show affirmatively that such departure from the customary mode of trial has been the probable cause of his conviction. The shield which the law has provided would fall far short of affording him the protection intended if it might be thrown aside at pleasure

and he have no right to complain unless he could prove that the want of it had been actually prejudicial to his case, a matter which it might in many cases be very difficult to prove notwithstanding such was the fact. He has the right, therefore, to call upon the officers of the government in such case before they demand judgment, to show that the irregularity in the trial has not been the means of injustice in the verdict."

The above extracts from the opinions of learned justices state exactly the true doctrine with reference to the duty of a state in this particular and this has been laid down again and again.

Where the question whether due process of law has been followed cannot possibly arise until after verdict, as was the admitted situation in the case at bar, there is no essential difference between the inquiry then and upon the *voir dire*. Nothing has intervened between the *voir dire* and the inquiry instituted after verdict, except the verdict itself, and the presumption of the soundness of the verdict rises no higher than the source from which it sprang.

The presumption of the correctness of the verdict disappears with the presumption of the sanity of the juror in question. In the case at bar it was unquestioned by the government, that juror White was incurably insane within twenty hours after the verdict was rendered, and the fact that the trial judges were in reasonable doubt as to his sanity at the time of the verdict, is conclusive proof that the presumption of sanity had been rebutted by the prisoner and the government was unable to show beyond a reasonable doubt that the juror was sane. To hold that the interposition of a verdict throws the burden of proof upon the prisoner to show the juror's insanity affirmatively, would be to beg the question, because the very question to be decided is whether the verdict was a verdict of twelve men concerning whose sanity there is no reasonable doubt. To say that the verdict itself must be presumed to have been rendered by a jury whose mentality was sound beyond a reasonable doubt, and that that presumption cannot be rebutted, has only the effect of throwing the burden of proof upon the prisoner to show affirmative insanity and that would be assuming the very thing in controversy. It would compel the prisoner to submit to a verdict at the hands of twelve jurors none of whom was mentally sound beyond a reasonable doubt, with no opportunity to show

that there was a reasonable doubt as to the sanity of any or all of them. When the prisoner in the case at bar suggested to the court the mental incompetency of the juror White and introduced evidence admittedly sufficient to overcome the presumption of sanity, it was then the duty of the government to demonstrate beyond a reasonable doubt that the juror was mentally sound. Having failed to do so, and it appearing that there was a reasonable doubt as to his sanity, the trial justices should have set aside the verdict in which that juror participated.

The only duty that devolves upon the prisoner in the proceeding upon his suggestion to the authorities that his constitutional rights have been impaired, is the duty of going forward and producing sufficient evidence to create in the minds of the court a reasonable doubt as to the existence of the defect which he suggests.

Upon the *voir dire* it is well settled that if the prisoner challenges a juror, even for a disability extrinsic of his mental qualifications, all that it is necessary for him to do is to introduce evidence that is sufficient to create a reasonable doubt in the mind of the court. Having done that, it is the duty of the government to show beyond a reasonable doubt that the juror is a proper one. No less a constitutional authority than Chief Justice Cooley of the Supreme Court of the State of Michigan lays this down in *Holt* vs. *People*, 13 Michigan 224 at 226 and 227 where he says:

"And we also think that in criminal cases whenever after a full examination, the evidence given upon a challenge, leaves a reasonable doubt of the impartiality of the juror, the defendant should be given the benefit of the doubt."

He says further, that upon a challenge in a criminal case, the only burden upon the challenging party is to produce evidence sufficient, so that it leaves the juror's impartiality in reasonable doubt; and that having done so, a *prima facie* case is established. It is for the state to remove that reasonable doubt. In the case at bar, not only was sufficient evidence produced by the prisoner in the first instance to raise a reasonable doubt as to the sanity of juror White, but even after the government had introduced all of its evidence and the hearing had been completed, the trial justices were still left in reasonable doubt, as appears by their finding.

There is another line of authorities that is extremely significant, in the discussion of the principle involved in the case at bar. The majority of the courts of this country hold that where intoxicating liquor has been introduced into the jury room the verdict must, as a matter of law, be set aside and the court will not inquire whether the jurors have partaken of the liquor or not. This is for the reason as stated by Chief Justice Shaw in *Commonwealth* vs. *Roby*, 12 Pickering 496 at page 519, because "no reliance can be placed upon its purity and correctness."

These courts hold that if it appears that a situation exists in which there is any possibility that the jurors were not mentally in condition to perform their duties, the verdict must as a matter of law be set aside, as it is not consistent with the underlying principles of justice and of constitutional rights—that there should be the slightest suspicion that the prisoner has not had a fair and impartial trial at the hands of a tribunal unquestionably competent mentally to hear him.

See *Ryan* vs. *Harrow*, 27 Iowa 494.
Leighton vs. *Sargent*, 31 N. H. 119 at 137.
State vs. *Greer*, 22 W. Va. 800 at pp. 825 to 830 inclusive.
Kellogg vs. *Wilder*, 15 Johns 455.
State vs. *Baldy*, 17 Iowa 39.
Gregg vs. *McDavid*, 4 Harr. 367.
State vs. *Bullard*, 16 N. H. 139.
People vs. *Ransom*, 7 Wend., 417.
Commonwealth vs. *Roby*, 12 Pickering 496 at page 512 *et seq.*
Hogshead vs. *State*, 6 Humph. 59.

Even in those cases where it has been held that the mere presence of intoxicating liquor in the jury room is not sufficient, but that it must appear that the jurors have partaken of it, the courts are agreed on the proposition as laid down by Bronson, J. in *Wilson* vs. *Abrahams*, 1 Hill 207 that:—

"When there is *reason to suspect* that he (the juror) has drank so much * * * as to unfit him for the proper discharge of his duty, the verdict ought not to stand."

It is so held also, with reference to the improper separation of the jury during the trial, which separation may have been

entirely harmless; and have caused the prisoner to suffer no detriment whatever. It is well settled that where there has been an improper separation of the jury during the trial, the prisoner, if found guilty, is entitled to the benefit of the presumption that the irregularity has been hurtful to him; and the *onus* is on the state *to show beyond a reasonable doubt* that the defendant has sustained no injury on account of the separation.

See *State* vs. *Robinson*, 20 W. Va. 713 at pages 751 to 764, inclusive and cases cited therein.

Monroe vs. *State*. 5 Georgia 85 at pages 145 to 153.
State vs. *Prescott*, 7 N. H. 287.
Jumpertz vs. *The People*, 21 Ill. 375 at pages 411 to 414.
Maher vs. *The State*, 3 Minn. 444 at 447.
McLain vs. *The State*, 10 Yerger, 241.
Woods vs. *State*, 43 Miss. 364.
State vs. *Evans*, 21 La. Ann. 321.
Organ vs. *State*, 26 Miss .78.
State vs. *Dolling*, 37 Wis. 396.

The same principle is the basis of the practically unanimous holding of the courts of this country, including this Court, that due process of law is not observed if a defendant in a capital case be tried before a less than the constitutional number of jurors, even though the defendant himself consent to such procedure. It is as stated by Christiancy, J., in *Hill* vs. *People*, 16 Mich. 351 at 358, "But independent of all theories, and as a practical question, we think there would be great danger in holding it competent for a defendant in a criminal case by waiver or stipulation to give authority which it could not otherwise possess, to a jury of less than twelve men for his trial and conviction; or to deprive himself in any way of the safeguards which the constitution has provided him in the unanimous agreement of twelve men qualified to serve as jurors by the general law of the land."

And also, on page 357, "But a criminal prosecution in which the people, in their sovereign capacity, prosecute for a crime against the laws of the whole society and seek to subject the defendant to punishment, must, it seems to us, be considered as a proceeding *in invitum* against the will of the defendant throughout, so far as relates to a question of this kind or any question as to the legal constitution of the court or jury by which

he is to be tried. It would be adding materially to the generally recognized force of the obligation of contracts to hold that a defendant charged with a crime might, without a trial, enter into a binding contract with the prosecuting attorney (representing the state) to go to the penitentiary for a certain number of years in satisfaction for the offence. And yet it would approximate such a position, to hold that he might be bound by a contract providing for a trial before a court or jury unknown to the constitution or the laws, the result of which trial might be to place him in the same penitentiary."

As was also said by Mr. Justice Harlan in *Thompson* vs. *Utah*, 170 U. S. 343, at 349: "When Magna Charta declared that no freeman should be deprived of life, etc., 'but by the judgment of his peers or by the law of the land' it referred to a trial by twelve jurors. Those who emigrated to this country from England brought with them this great privilege as their birthright and inheritance as a part of that admirable common law which had fenced around and interposed barriers on every side against the approaches of arbitrary power. * * * It must consequently be taken that the word 'jury' and the words 'trial by jury' were placed in the Constitution of the United States with reference to the meaning affixed to them in the law as it was in this country and in England at the time of the adoption of that instrument.

* * * When Thompson's crime was committed it was his constitutional right to demand that his liberty should not be taken from him except by the joint action of the court and the unanimous verdict of a jury of twelve persons. To hold that a state could deprive him of his liberty by the concurrent action of a court and eight jurors would recognize the power of the State not only to do what the United States in respect to Thompson's crime could not, at any time, have done by legislation, but to take from the accused a substantial right belonging to him when the offence was committed."

And on page 353, "It is sufficient to say that it was not in the power of one accused of felony by consent expressly given, or by his silence, to authorize a jury of only eight persons to pass upon the question of his guilt."

The fundamental reason underlying this principle, that a tribunal is not consistent with due proces of law when it is not such a one as is prescribed by the constitution, even though the

defendant consent, is that the duty is placed by the constitution upon the state to see to it that the safeguards provided by the constitution for the protection of the citizen are afforded to him, and if the constitutional tribunal is not furnished to him by the state, it is no defence for the state to say that the defendant consented or was willing to be tried before that arbitrary body. The defendant has absolutely nothing to do with the matter. The duty to furnish such tribunal and to see that due process of law within the meaning of the constitution is followed throughout the whole proceeding, rests solely upon the state.

According to the position taken by the Supreme Judicial Court of Massachusetts if the state furnishes at the outset a proper tribunal consisting of twelve qualified jurors, and sometime during the trial, through sickness or death, it ceases to be a constitutional tribunal, in that it consists of less than twelve men, it would not be the duty of the state to interest itself in the slightest, in that situation; but it would be for the defendant to assume the *onus* of showing that he was being deprived of his constitutional rights, and if he did not do so the trial would proceed, the verdict be rendered and a judgment of death pronounced based upon that verdict. It is respectfully submitted that the unbroken line of authorities in this country hoids that as soon as such a situation arises, at the suggestion of the prisoner or anyone else, even though the state has at the outset furnished a competent and constitutional tribunal, it is the duty of the state, of its own motion whether the defendant acquiesce affirmatively or does nothing to stop the proceeding, to undo what has been done.

See *Thompson* vs. *Utah*, 170 U. S. 143.
Hopt vs. *Utah*, 110 U. S. 574 at 590.
Cancemi vs. *People*, 18 N. Y. 128.
Dickinson vs. *United States*, 159 Fed. Rep. 801.
Hill vs. *People*, 16 Mich. 351.

The theory then, underlying all of the above classes of cases is the fundamental principle of constitutional law, that it is the duty of the state to see to it that a citizen is protected by all of the essentials demanded by due process of law. If it appears at any time upon his suggestion, or that of anyone else, that due process of law has not been followed, and the inquiry that is

entered into demonstrates that there is a reasonable doubt whether the prisoner has had the constitutional rights guaranteed to him, as a matter of public policy for the protection not only of that citizen but of all citizens in the future, it is essential that the proceeding attacked should be set aside and that no action whatever based upon its decision should be taken toward depriving the citizen of his life or liberty.

It is absolutely immaterial what the opinion of the Supreme Judicial Court of Massachusetts as representing the state of Massachusetts, may be with reference to the duties and responsibilities of the state. This Court is the only tribunal that has the power to lay down the duties and responsibilities of a State under the Fourteenth Amendment. The duty of the Commonwealth of Massachusetts in the case at bar was to see to it that the constitutional rights of the prisoner were preserved to him and when upon suggestion by him that due process of law had not been followed, it appeared after a full hearing that there was reasonable doubt whether he had had a hearing before a panel composed of mentally competent jurors, it was the duty of the state of Massachusetts to set aside that proceeding. Inasmuch as the Commonwealth has refused to do so this Court will, under the power which it possesses, set that proceeding aside, and compel the state of Massachusetts to desist from attempting the enforcement of a judgment based upon the verdict in question.

For the reasons hereinbefore set forth, therefore, it is respectfully submitted that this Court will not lay down the doctrine that under the Fourteenth Amendment to the Constitution of the United States a citizen of the United States is compelled to present his defence when on trial for his life, before a tribunal, the members of which may have any lack of mental capacity short of actual affirmative insanity. If that is all the security that is afforded by the due process clause of the Fourteenth Amendment it gives but small protection to a citizen on trial for his life. Why should such a doctrine be laid down? Has it come to pass that the number of unquestionably sane citizens available for jury duty is so few, that of actual necessity a jury in a capital case must be composed of men of any degree of mental infirmity, providing that they are not actual inmates of insane asylums? Is the life of a citizen thus so lightly to be held in this regard, that the state is to be

permitted to take it away, by enforcing a judgment based upon the verdict of a panel concerning whose mental capacity there is grave and reasonable doubt? Is it the law, when a state charges a citizen of the United States with the crime of murder that a contest then is to be initiated between the state and the prisoner in which the former is to endeavor to deprive him, so far as it is possible, of all of the constitutional safeguards guaranteed to him by the Constitution of the United States; and that it is for the prisoner to protect himself as best he may? Or is the true doctrine as contended for by the prisoner in the case at bar and as laid down by the most eminent authorities upon constitutional law, that the duty devolves upon the people, acting through their constituted authorities in the form of the state, to see to it that the constitutional rights of a citizen placed on trial for his life, are most jealously guarded? If at any time it appears, either through the suggestion of the prisoner himself or in any other way, that the very essence of due process of law, namely, the tribunal itself before which he has been obliged to present his defence and which has passed judgment upon him, is for some cause or another composed of one or more members concerning whose sanity there is a reasonable doubt, the state should thereupon promptly set aside the proceeding in which such tribunal participated and cease from acting further to deprive him of his life, on any judgment based upon such proceeding. From all of which, therefore, if follows that the Massachusetts Court is in error in each and every of the rulings which it made and which are the subject of all of the errors assigned and heretofore set forth in this brief; that the judgment of the Superior Court of the Commonwealth of Massachusetts should be reversed and this cause remanded thereto for proceedings consistent with the principles above set forth.

Respectfully submitted,

CHESTER S. JORDAN,
Plaintiff in Error.

CHARLES W. BARTLETT,
HARVEY H. PRATT,
JEREMIAH S. SULLIVAN,
ARTHUR THAD SMITH,
of Counsel.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 519.

CHESTER S. JORDAN, PLAINTIFF IN ERROR,

v.

COMMONWEALTH OF MASSACHUSETTS.

ERROR TO THE SUPERIOR COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

BRIEF FOR THE COMMONWEALTH OF MASSACHUSETTS.

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The plaintiff in error was convicted of murder in the first degree in the Superior Court within and for the county of Middlesex, in the Commonwealth of Massachusetts, by a verdict rendered on the fourth day of May, 1909. (See Record, p. 11.) On the tenth day of May, 1909, the plaintiff in error filed a motion for a new trial, and presented affidavits to prove the insanity of Willis A. White, one of the jurors who concurred in the verdict. (See Record, p. 56.) The court granted a hearing on the motion, received all the evidence, and found and ruled as follows: —

"We find by a fair preponderance of all the evidence as a fact that the juror Willis A. White was of sufficient mental capacity during the entire trial of Chester S. Jordan and until after the ver-

dict was returned, to intelligently consider the evidence, appreciate the arguments of counsel, the rulings of law, the charge of the court, and to arrive at a rational conclusion, and therefore we deny the motion. Having found the above fact we deem it unnecessary to consider the requests for rulings." (Record, p. 54.)

The exceptions taken by the plaintiff in error to the foregoing finding, ruling and refusal to give the seventy-two rulings by him requested (see record, pp. 66–75), were overruled and the judgment affirmed by the Supreme Judicial Court for the Commonwealth of Massachusetts (see Record, p. 76), and the case comes to this court by writ of error. (See Record, p. 1.)

The twenty-nine assignments of error (see Record, pp. 5–10) may be fairly considered to raise but the single question of whether or not the court erred in refusing to rule that the plaintiff in error was entitled to a new trial unless it were proved beyond a reasonable doubt that the juror White was sane during the whole of the trial and until after verdict. It is to be noted that the trial court did not find, as the plaintiff in error argues, that there was a reasonable doubt as to the sanity of the juror White, or, what is much the same thing, the finding does not state nor imply that the court was unable to find that his sanity was proved beyond a reasonable doubt. These questions were expressly disregarded as immaterial, inasmuch as the court found he *was sane* by a fair preponderance of all the evidence, and on that fact ruled that under the Massachusetts procedure a new trial need not be granted.

It is admitted that the State court cannot be charged with error in its finding of fact (King *v.* West Virginia, 216 U. S. 92, 100), nor in its interpretation of the Massachusetts law of procedure in criminal trials (Twining *v.* New Jersey, 211 U. S. 78, 91), but the plaintiff in error contends that when in a capital case the question of a juror's sanity is raised after verdict, unless the prosecution proves beyond a reasonable doubt that the juror was sane, the clause of the Fourteenth Amendment which reads "nor shall any State deprive any person of life, liberty or property without due process of law," requires that the accused shall be granted a new trial.

It is submitted that the contention is not valid.

I.

The words "due process of law" do not prescribe particular rules or forms of procedure for State trials.

Although required by the Constitution in prosecutions in the Federal courts, the State courts, in criminal trials, need not proceed by indictment (Hurtado *v.* California, 110 U. S. 516), nor afford a trial by jury (Maxwell *v.* Dow, 176 U. S. 581; Hallinger *v.* Davis,

146 U. S. 314), nor conduct all the proceedings of the trial in the presence of the accused (Howard *v.* Kentucky, 200 U. S. 164).

In Missouri *v.* Lewis, 101 U. S. 22, 31, the court says: —

"There is nothing in the Constitution to prevent any State from adopting any system of laws or judicature it sees fit for all or any part of its territory. If the State of New York, for example, should see fit to adopt the civil law and its method of procedure for New York City and the surrounding counties, and the common law and its method of procedure for the rest of the State, there is nothing in the Constitution of the United States to prevent its doing so. . . ."

"The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each State prescribes its own modes of judicial proceeding."

In Louisville & Nashville Rd. Co. *v.* Schmidt, 177 U. S. 230, 236, the court says: —

"It is no longer open to contention that the due process of law clause of the Fourteenth Amendment to the Constitution of the United States does not control mere forms of procedure in State courts or regulate practice therein. All its requirements are complied with, provided in the proceedings claimed not to have been due process of law, the person condemned has had sufficient notice and adequate opportunity has been afforded him to defend."

II.

As to the mode of procedure in a trial court of a State, the phrase "due process of law" requires only that the conduct of the case be in accordance with the regular procedure of the State, and that such procedure shall not deprive the accused of a fundamental right.

In Walker *v.* Sauvinet, 92 U. S. 90, 93, the court says: —

"This requirement of the Constitution is met if the trial is had according to the settled course of judicial proceedings. Due process of law is process due according to the law of the land. This process in the States is regulated by the law of the State."

In Allen *v.* Georgia, 166 U. S. 138, 140, the court says: —

"Without attempting to define exactly in what due process of law consists, it is sufficient to say that, if the Supreme Court of a State has acted in consonance with the constitutional laws of a State and its own procedure, it could only be in very exceptional circumstances that this court would feel justified in saying that there had been a failure of due legal process. We might ourselves have pursued a different course in this case, but that is not the test. The plaintiff

in error must have been deprived of one of those fundamental rights, the observance of which is indispensable to the liberty of the citizen, to justify our interference."

In Howard *v.* Kentucky, 200 U. S. 164, 173, the court says: —

"We cannot assume error in the decision of the Court of Appeals. We accept it, as we are bound to do, as a correct exposition of the law of the State — common, statutory and constitutional. Our inquiry can only be, did the State law as applied afford plaintiff in error due process as those words are used in the Fourteenth Amendment? We think it did. It is not necessary to enter into a lengthy discussion of what constitutes due process of law. . . . It may be admitted that the words 'due process of law', as used in the Fourteenth Amendment, protect fundamental rights. What those are cannot ever be the cause of much dispute. In giving them protection, however, it was not designed, as was observed by the Chief Justice in *In re Converse, supra* (137 U. S. 624, 631), 'to interfere with the power of the State to protect the lives, liberty and property of its citizens; nor with the exercise of that power in the adjudication of the courts of the State in administering the process provided by the law of the State.'"

III.

Conformance to the Massachusetts law of procedure does not afford an accused a right to have a new trial unless the juror's sanity is proved beyond a reasonable doubt.

The Supreme Judicial Court of Massachusetts, in their opinion in this case, declared that the law of procedure in criminal trials in Massachusetts did not give the plaintiff in error such a right. (See Record, p. 77.)

This pronouncement of the law of Massachusetts is conclusive.

Twining *v.* New Jersey, 211 U. S. 78, 90.
Howard *v.* Kentucky, *supra.*
Leeper *v.* Texas, 139 U. S. 462, 467.

IV.

By this settled course of procedure in Massachusetts the plaintiff in error has not been "deprived of one of those fundamental rights, the observance of which is indispensable to the liberty of the citizen", for, that an accused should be granted a new trial unless the juror's sanity is proved beyond a reasonable doubt, is not such a fundamental right.

A. It has never been so held, and the inference of the decisions is against the proposition.

1. It was said in Allen *v.* Georgia, *supra:* —

"If the Supreme Court of a State has acted in consonance with the constitutional laws of a State and its own procedure, it could only be *in very exceptional circumstances* that this court would feel justified in saying that there had been a failure of due legal process."

For ascertaining what are the fundamental rights in matters of procedure, which are protected by the phrase "due process of law", Mr. Justice Moody, in Twining *v.* New Jersey, 211 U. S. 78, 110, lays down the following rule: —

"Due process of law requires that the court which assumes to determine the rights of the parties shall have jurisdiction, and that there shall be notice and opportunity for hearing given the parties. Subject to these two fundamental conditions, which seem to be universally prescribed in all systems of law established by civilized countries, this court has up to this time sustained all State laws, statutory or judicially declared, regulating procedure, evidence and methods of trial, and held them to be consistent with due process of law. Among the most notable of these decisions are those sustaining the denial of jury trial both in civil and criminal cases, the substitution of informations for indictments by a grand jury, the enactment that the possession of policy slips raises a presumption of illegality, and the admission of the deposition of an absent witness in a criminal case. The cases proceed upon the theory that, given a court of justice which has jurisdiction and acts, not arbitrarily but in conformity with a general law, upon evidence, and after inquiry made with notice to the parties affected and opportunity to be heard, then all the requirements of due process, so far as it relates to procedure in court and methods of trial and character and effect of evidence, are complied with."

In the requirements above enumerated (all of which were fulfilled by the course of proceedings in the case at bar) there is no mention of a right to a new trial as claimed by the plaintiff.

2. It has been decided that the State may regulate the number of challenges in criminal cases (Hayes *v.* Missouri, 120 U. S. 68); that it may prescribe the qualifications of jurymen in criminal cases (*In re* Jugiro, 140 U. S. 291); and that it may prescribe the number of jurors in criminal cases (Maxwell *v.* Dow, *supra*); and if it is within the power of the State to say both the number and the qualifications of jurors in a criminal case, it may well prescribe that eleven jurors and one who qualifies by a fair preponderance of the evidence as to his sanity shall constitute the trial jury. As to powers of States in these matters, this court, in Hayes *v.* Missouri, *supra*, has said: —

"Legislative directions are necessary, prescribing the class from which the jurors are to be taken, whether from voters, taxpayers,

and free-holders, or from the mass of the population indiscriminately
the number to be summoned from whom the trial jurors are to b
selected; the manner in which their selection is to be made; the ob
jections that may be offered to those returned, and how such objec
tions shall be presented, considered, and disposed of; the oath to b
administered to those selected; the custody in which they shall b
kept during the progress of the trial; the form and presentation o
their verdict; and many other particulars. All these, it may be sai
in general, are matters of legislative discretion."

3. In the federal courts, the denial of a new trial is not assignabl
as error.

> Pickett *v.* United States, 216 U. S. 456.
> Bucklin *v.* United States, 159 U. S. 682.

If the "due process" clause of the Fifth Amendment, which applie
to procedure in the federal courts, does not vouchsafe to an accuse
a new trial as a matter of right, but leaves him and his claim to th
determination of the trial court, it would seem that a right to a nev
trial is not guaranteed by the same language in the Fourteenth
Amendment, which applies to procedure in the State courts. It i
said, in Twining *v.* New Jersey, *supra*, at page 101:—

"If any different meaning of the same words, as they are used i
the Fourteenth Amendment, can be conceived, none has yet appeare
in judicial decision."

B. There is no rule of the common law which prescribes that in
capital case, unless it be proved beyond a reasonable doubt that th
juror was sane, a new trial shall be granted.

1. In England at common law a person convicted of a capita
felony had *no* right to a new trial. Blackstone says that after tria
and conviction the prisoner may plead, in arrest of judgment, an
exception to the indictment, a pardon, or the benefit of clergy, bu
"if all these resources fail, the court must pronounce that judgmen
which the law hath annexed to the crime. . . ."

> 4 Blackstone's Commentaries, 375 and 376.

This rule continued in force as to capital felonies until after th
Revolution in America.

> *See* Rex *v.* Mawbey, 6 Term Reports, at p. 638.
> *Also* Commonwealth *v.* Green, 17 Mass. 515, 533.

2. In Massachusetts although the rule was changed and it wa
decided in 1822, in Commonwealth *v.* Green, *supra*, that a nev
trial could be granted in capital cases, yet as pointed out in Com

monwealth *v.* Roby, 12 Pick. 496, there was "no intimation as to what species of irregularity would operate as a ground for a new trial." No case in Massachusetts has held that failure to prove a juror sane beyond a reasonable doubt is ground for a new trial; on the contrary, in the only case in which the question has arisen, the present one, the Supreme Judicial Court, by affirming the judgment, held that the common law of Massachusetts does not require that a new trial be granted on such grounds. (See Record, p. 77.)

3. The common law rule in America, as evidenced by the decisions in the other States where this question has arisen, does not afford a new trial as claimed by the plaintiff in error.

State *v.* Howard, 118 Mo. 127.
State *v.* Scott, 1 Hawks, 8 N. C. 24.
Surles *v.* State, 89 Ga. 167.
Wall *v.* State, 126 Ga. 549.
Burik *v.* Dundee Woolen Co., 66 N. J. Law, 420.

In none of the cases was it ruled that on the suggestion of insanity of a juror the defendant has a right to a new trial unless it be proved beyond a reasonable doubt that the juror was sane. In all the cases where there was evidence to support his sanity, the motion was held to have been properly denied, although the evidence raised a doubt as to the juror's sanity. In the single case where it was held a new trial should have been granted, there was no evidence tending to prove the sanity. It is to be noticed that the court which gives the opinion in these cases passed upon the evidence adduced, and determined the question of whether a new trial should be granted, as a matter of right on the evidence, and were not simply upholding a ruling of the trial court made in the exercise of discretion. The language of the opinions, so far from sustaining the contention of the plaintiff in error, shows the rule to be that in order to have a new trial it is incumbent on the defendant to establish that the juror was insane.

In State *v.* Howard, *supra*, there was a motion for a new trial of a capital case, on the ground that one of the jurors was insane. It appeared on the court record that about five years before he had been declared insane and committed to an asylum. It did not appear that he had ever been discharged. There was some evidence (the opinion does not state what) that his neighbors considered him sane. The court denied the motion for a new trial, stating that it would not assume his insanity to be continuous; that from the fact that he was at large the presumption was that he was of sound mind at the time of the trial. That the court made its ruling on a "presumption" indicates that there was a paucity of evidence to establish sanity,

that there was opportunity for a reasonable doubt, and that the burde was on the defendant to prove the juror's insanity, by overcomin this "presumption", before he had a right to a new trial.

In State *v.* Scott, 1 Hawks, 8 N. C. 24, there was a motion for new trial of one accused of killing a negro, on the ground that one the jurors was insane, and to support the motion the defendant file a physician's affidavit to the effect that the juror had been insan from drink some time before, that he was intoxicated during the wee of the trial, and that in the opinion of the physician he was probab deranged during the trial; also an affidavit of a mechanic to the effe that before breakfast on the day of the trial the juror's conduct w so strange and his expressions so absurd that he believed him to b deranged. There was no evidence offered to prove the juror's sanit The court held that, though enough to raise a doubt, the affidavi were not enough to satisfy them that the juror was insane, and ther fore the motion was properly denied.

In Surles *v.* State, 89 Ga. 167, a juror was taken sick and con tinued on a bed in the jury box. There was conflicting evidence as to whether he was mentally competent, as a result of his illness. Th court held that as the juror and his medical attendant deposed tha his mind was good, the motion for a new trial should be denie There was no suggestion that it was incumbent on the prosecutio to prove, or that the proof established, that the juror was sane beyon a reasonable doubt.

In Burik *v.* Dundee Woolen Co., 66 N. J. Law, 420, the facts i connection with the motion for a new trial were very similar to thos of the present case. One of the jurors became insane a few day after the trial, and on the motion for a new trial there was conflictin evidence as to the juror's sanity at the time of the trial. The cour in affirming the order denying the new trial, said: —

"We are not satisfied on the proofs adduced that the man was in competent to act as a juror." —

thus clearly adopting the rule that the burden was on the part seeking the new trial to prove that the juror was insane; and tha case is perhaps stronger than the present one, inasmuch as there although the fellow-jurors were allowed to testify in favor of th sanity of the juror in question, they were not allowed to testif against his sanity.

In Hogshead *v.* State, 6 Humph. (Tenn.) 59, a new trial wa granted for insanity of the juror, but the case is not in point as al the evidence as to mental capacity was to the effect that the juro suffered from delirium tremens. As there was no conflict of evidence the question in this case as to the burden and amount of proof di not arise, but it is to be noted that the court ruled a new trial shoul

be granted, not because it was possible (*i.e.*, that there was a reasonable doubt), but because it was "probable" (*i.e.*, that the inference from the evidence was), that he was not of mental capacity.

The defendant has been tried according to the settled course of judicial proceedings in Massachusetts, which, as a soverign State, is not restricted in its administration of justice, except that it may not deny to any person a fundamental right of legal process. The procedure, however, which the Commonwealth of Massachusetts has instituted, as far as regards this particular case, does not deprive an accused of any fundamental right, for neither in the Constitution itself, in the decisions of this court, in the old common law of England, nor in the common law of the different States, has the right for which the plaintiff in error contends ever been recognized. On the contrary, it appears that the rule of procedure in force in Massachusetts conforms to the settled usage of the common law, and this has always been held to fulfil the constitutional requirement of "due process." In Hurtado *v.* California, *supra,* it is said: —

"A process of law, which is not otherwise forbidden, must be taken to be due process of law, if it can show the sanction of settled usage, both in England and this country."

Murray's Lessee *v.* Hoboken Land Co., 18 How. 272, 280.

It is respectfully submitted that the judgment of the court below should be affirmed.

JAMES M. SWIFT,
Attorney-General for the Commonwealth of Massachusetts.

WALTER A. POWERS,
Assistant Attorney-General.

JORDAN *v.* COMMONWEALTH OF MASSACHUSETTS.

ERROR TO THE SUPERIOR COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

No. 519. Argued April 16, 1912.—Decided May 27, 1912.

Subject to the requirement of due process of law, the States are under no restriction as to their methods of procedure in the administration of public justice. *Twining* v. *New Jersey*, 211 U. S. 78, 111.

Due process of law implies a tribunal both impartial and mentally competent to afford a hearing; but due process is not denied when a competent state court refuses to set aside a verdict because the sanity of one of the jurors which has been questioned is established, after an inquiry in accordance with the established procedure of the State, only by a preponderance of evidence.

In this case *held*, that one convicted by a jury and sentenced to death was not denied due process of law because after the verdict one of the jurors became insane and the court, after an inquiry had in accordance with the established procedure of the State, found by a preponderance of evidence that the juror was of sufficient mental capacity during the trial to act as such and therefore refused to set the verdict aside.

The practice of the Massachusetts courts in this case was not inconsistent with the rules of the common law in regard to determining the mental capacity of jurors.

207 Massachusetts, 259, affirmed.

THE facts, which involve the question of whether one convicted in a state court by a jury, a member of which was possibly insane at the time, was denied due process of law, are stated in the opinion.

Mr. Harvey H. Pratt and *Mr. Arthur Thad Smith*, with whom *Mr. Charles W. Bartlett* and *Mr. Jeremiah S. Sullivan* were on the brief, for plaintiff in error:

The trial court in refusing to set aside the verdict de-

prived defendant of one of those fundamental rights, the observance of which is indispensable to the liberty of the citizen.

A defendant cannot be deprived of any of his fundamental rights by a form of procedure. There is a limit beyond which state courts cannot go. *Fayerweather* v. *Ritch*, 195 U. S. 276; *Chicago, B. &c. R. R.* v. *Chicago*, 166 U. S. 226; *Brown* v. *New Jersey*, 175 U. S. 172, 175.

Due process of law requires an unquestionably competent tribunal before whom a citizen is tried; a tribunal unquestionably incompetent to render judgment upon him because it contains among its members a person who was unqualified mentally to render a verdict does not constitute due process. *Chicago, B. &c. R. R.* v. *Chicago, supra.*

Any matter relating to the character of the tribunal before which a person is to be tried is one of substance and not one of form. *Thompson* v. *Utah*, 170 U. S. 343.

The refusal of the trial court to set aside the verdict and sentence of death based upon the verdict of a jury, one of the members of which was incompetent mentally, deprived defendant of one of his fundamental rights.

There is the clearest line of demarcation between the mental disqualification of a juror and the disqualifications and irregularities that have been declared by this court to be within the power of the States to pass upon, and with which this court will not interfere. *Kohl* v. *Lehlback*, 160 U. S. 293; *Wassum* v. *Feeney*, 121 Massachusetts, 93; *Commonwealth* v. *Wong Chung*, 186 Massachusetts, 231, do not apply.

In Massachusetts there are certain grounds for a new trial that require a new trial to be granted as matter of law and which if they exist do not permit the court to refuse a new trial as a matter of discretion. *Read* v. *Cambridge*, 124 Massachusetts, 567; *Sargent* v. *Roberts*, 1 Pick. 337; *Shea* v. *Lawrence*, 1 Allen, 167; *Merrill* v. *Nary*, 10 Allen, 16.

Under the Fourteenth Amendment the duty of seeing to it in the first instance that due process of law is observed in the trial of the citizen, devolves, necessarily, on the State. The conduct of the courts and the procedure therein is placed exclusively in the power of the State and to the State is entrusted the duty of seeing to it that the constitutional rights of citizens are retained for them. *Allen* v. *Georgia*, 166 U. S. 138, 140; *Chicago &c. R. R.* v. *Chicago*, 166 U. S. 226, 234, 235; *Thompson* v. *Utah*, 170 U. S. 343, 350–355; *Hill* v. *People*, 16 Michigan, 351, 357; *West Virginia* v. *Cartwright*, 20 W. Va. 32, 45; *State* v. *Prescott*, 7 N. H. 287, 292.

Upon the *voir dire*, if the prisoner challenges a juror, even for a disability extrinsic of his mental qualifications, all that is necessary for him to do is to introduce evidence that is sufficient to create a reasonable doubt in the mind of the court; and it is then the duty of the Government to show beyond a reasonable doubt that the juror is a proper one. *Holt* v. *People*, 13 Michigan, 224, 226, 227.

If it appears that a situation exists in which there is any possibility that the jurors were not mentally in condition to perform their duties, the verdict must as a matter of law be set aside. *Commonwealth* v. *Roby*, 12 Pick. 496, 512, 519; *Ryan* v. *Harrow*, 27 Iowa, 494; *Leighton* v. *Sargent*, 31 N. H. 119, 137; *State* v. *Greer*, 22 W. Va. 800, 825, 830; *Kellogg* v. *Wilder*, 15 Johns. 455; *State* v. *Baldy*, 17 Iowa, 39; *Gregg* v. *McDavid*, 4 Harr. 367; *State* v. *Bullard*, 16 N. H. 139; *People* v. *Ransom*, 7 Wend. 417; *Hogshead* v. *State*, 6 Humph. 59; *Wilson* v. *Abrahams*, 1 Hill, 207; *State* v. *Robinson*, 20 W. Va. 85, 145, 152; *Monroe* v. *State*, 5 Georgia, 85, 145–153; *State* v. *Prescott*, 7 N. H. 287; *Jumpertz* v. *People*, 21 Illinois, 375, 411–414; *Maher* v. *State*, 3 Minnesota, 444, 447; *McLain* v. *State*, 10 Yerger, 241; *Woods* v. *State*, 43 Mississippi, 364; *State* v. *Evans*, 21 La. Ann. 321; *Organ* v. *State*, 26 Mississippi, 78; *State* v. *Dolling*, 39 Wisconsin, 396.

Due process of law is not observed if a defendant in a capital case be tried before a less than the constitutional number of jurors, even though the defendant himself consent to such procedure. *Hill* v. *People*, 16 Michigan, 351, 358; *Thompson* v. *Utah*, 170 U. S. 343, 349.

The duty to furnish a constitutional tribunal and to see that due process of law within the meaning of the Constitution is followed throughout the whole proceeding, rests solely upon the State; and where the jury ceases to be a constitutional tribunal, at the suggestion of the prisoner or anyone else, even though the State has at the outset furnished a competent and constitutional tribunal, it is the duty of the State, of its own motion, whether the defendant acquiesce affirmatively or does nothing to stop the proceeding, to undo what has been done. See *Thompson* v. *Utah*, 170 U. S. 143; *Hopt* v. *Utah*, 110 U. S. 574, 590; *Cancemi* v. *People*, 18 N. Y. 128; *Dickinson* v. *United States*, 159 Fed. Rep. 801; *Hill* v. *People*, 16 Michigan, 351.

Mr. James M. Swift, Attorney General for the Commonwealth of Massachusetts, with whom *Mr. Walter A. Powers*, Assistant Attorney General, was on the brief, for defendant in error:

The state court cannot be charged with error in its findings of fact, *King* v. *West Virginia*, 216 U. S. 92, 100; nor in its interpretation of the Massachusetts law of procedure in criminal trials, *Twining* v. *New Jersey*, 211 U. S. 78, 91; but the contention that when in a capital case the question of a juror's sanity is raised after verdict, unless the prosecution proves beyond a reasonable doubt that the juror was sane, the due process clause of the Fourteenth Amendment requires that the accused be granted a new trial, is not valid.

The words "due process of law" do not prescribe particular rules or forms of procedure for state trials, *Hurtado* v. *California*, 110 U. S. 516, nor afford a trial by

jury, *Maxwell* v. *Dow*, 176 U. S. 581; *Hallinger* v. *Davis*, 146 U. S. 314; *Howard* v. *Kentucky*, 200 U. S. 164. See also *Missouri* v. *Lewis*, 101 U. S. 22, 31; *Louisville & Nashville R. R. Co.* v. *Schmidt*, 177 U. S. 230, 236.

Due process of law requires only that the conduct of the case be in accordance with the regular procedure of the State, and that such procedure shall not deprive the accused of a fundamental right. *Walker* v. *Sauvinet*, 92 U. S. 90, 93; *Allen* v. *Georgia*, 166 U. S. 138, 140; *Howard* v. *Kentucky*, 200 U. S. 164, 173.

Conformance to the Massachusetts law of procedure does not afford an accused a right to have a new trial unless the juror's sanity is proved beyond a reasonable doubt. This pronouncement of the law of Massachusetts by its Supreme Judicial Court is conclusive. *Twining* v. *New Jersey*, 211 U. S. 78, 90; *Howard* v. *Kentucky*, *supra*; *Leeper* v. *Texas*, 139 U. S. 462, 467.

By this settled course of procedure the plaintiff in error has not been deprived of one of those fundamental rights, the observance of which is indispensable to the liberty of the citizen, for, that an accused should be granted a new trial unless the juror's sanity is proved beyond a reasonable doubt, is not a fundamental right. *Allen* v. *Georgia*, *supra*; *Twining* v. *New Jersey*, 211 U. S. 78, 110.

A State may regulate the number of challenges in criminal cases, *Hayes* v. *Missouri*, 120 U. S. 68; may prescribe the qualifications of jurymen in criminal cases, *In re Jugiro*, 140 U. S. 291; and the number of jurors in criminal cases, *Maxwell* v. *Dow*, *supra*; and if it is within the power of the State to say both the number and qualifications of jurors in a criminal case, it may well prescribe that eleven jurors and one who qualifies by a fair preponderance of the evidence as to his sanity shall constitute the trial jury. *Hayes* v. *Missouri*, *supra*.

In the Federal courts, the denial of a new trial is not

assignable error. *Pickett* v. *United States*, 216 U. S. 456 *Bucklin* v. *United States*, 159 U. S. 682.

There is no rule of the common law which prescribes that in a capital case, unless it be proved beyond a reasonable doubt that the juror was sane, a new trial shall be granted. In England at common law a person convicted of a capital felony had no right to a new trial. 4 Blackstone's Com. 375, 376. This rule continued in force as to capital felonies until after the Revolution in America. See *Rex* v. *Mawbey*, 6 Term. R. 638; *Commonwealth* v. *Green*, 17 Massachusetts, 515, 533.

In Massachusetts, although the rule was changed and it was decided in 1822, in *Commonwealth* v. *Green*, *supra* that a new trial could be granted in capital cases, yet there was no intimation as to what species of irregularity would operate as a ground for a new trial. See *Commonwealth* v. *Roby*, 18 Pick. 496.

The common-law rule in America, as evidenced by the decisions of the other States where this question has arisen, does not afford a new trial as claimed by the plaintiff in error. *State* v. *Howard*, 118 Missouri, 127 *State* v. *Scott*, 1 Hawks (8 N. Car.), 24; *Surles* v. *State*, 89 Georgia, 167; *Wall* v. *State*, 126 Georgia, 549; *Burik* v. *Dundee Woolen Co.*, 66 N. J. L. 420. *Hogshead* v. *State* 6 Humph. 59, distinguished.

It appears that the rule of procedure in force in Massachusetts conforms to the settled usage of the common law, and this has always been held to fulfill the constitutional requirement of "due process." *Hurtado* v. *California*, *supra*; *Murray's Lessee* v. *Hoboken Land Co.*, 18 How. 272, 280.

Mr. Justice Lurton delivered the opinion of the court.

The plaintiff in error was convicted of the crime of murder in the first degree and sentenced to death, and the judgment was affirmed by the Supreme Judicial Court

of the Commonwealth of Massachusetts. The case is brought here upon a single question, namely, that the plaintiff in error has been denied due process of law under the Fourteenth Amendment, because he was tried by a jury which included one Willis A. White, concerning whose sanity it is said there existed reasonable doubt.

The jury had been selected in the usual way, and White had been accepted without knowledge by the State or the defendant of any question concerning his mental fitness. It was impanelled on April 20, 1909. On May 4 it was charged, and on the same day returned a verdict. On May 10, a motion for a new trial was made, based upon the suggestion by counsel for the prisoner that the juror White, during the hearing and at the time the verdict was agreed upon, was insane and incompetent to participate as a juror. The motion was heard by two of the trial Justices of the Superior Court, and much oral evidence bearing upon the sanity of the juror was introduced, all of which has been preserved by a bill of exceptions. At the conclusion of the evidence the prisoner presented no less than seventy-two requests for rulings and findings, made part of the record. The court found and ruled as follows (207 Massachusetts, 274):

"We find by a fair preponderance of all the evidence as a fact that the juror Willis A. White was of sufficient mental capacity during the entire trial of Chester S. Jordan until after the verdict was returned, to intelligently consider the evidence, appreciate the arguments of counsel, the rulings of law, the charge of the court, and to arrive at a rational conclusion, and therefore we deny the motion.

"Having found the above fact, we deem it unnecessary to consider the requests for rulings."

The numerous requests for rulings and special findings all relate to the burden of proof and the rules for the weighing of evidence upon the issues presented.

The Supreme Judicial Court, after a consideration of

the evidence upon which this finding was based, ruled that it could not be said that there was not evidence warranting the conclusion of the trial judge.

We shall assume that both the trial court and the Supreme Judicial Court have sustained the verdict of the jury because they were of opinion that it was not essential that the sanity of the juror under the circumstances of this case should be established by more than a fair preponderance of the evidence. The insistence is that thereby the constitutional guarantee of due process of law found in the Fourteenth Amendment has been violated.

That the procedure in this case was in conformity with the constitution and law of Massachusetts is determined by the judgment and opinion of the Supreme Judicial Court.

Subject to the requirement of due process of law, the States are under no restriction as to their method of procedure in the administration of public justice. That the court had jurisdiction and that there was a full hearing upon the issue made by the suggestion of the insanity of the juror is not questioned. "Subject to these two fundamental conditions, which seem to be universally prescribed in all systems of law, this court has up to this time sustained all state laws, statutory or judicially declared, regulating procedure, evidence and methods of trial, and held them to be consistent with due process of law." *Twining* v. *New Jersey*, 211 U. S. 78, 111.

In *Allen* v. *Georgia*, 166 U. S. 138, 140, it is said:

"Without attempting to define exactly in what due process of law consists, it is sufficient to say that, if the Supreme Court of a State has acted in consonance with the constitutional laws of a State and its own procedure, it could only be in very exceptional circumstances that this court would feel justified in saying that there had been a failure of due legal process. We might ourselves have pursued a different course in this case, but that is not

the test. The plaintiff in error must have been deprived of one of those fundamental rights, the observance of which is indispensable to the liberty of the citizen, to justify our interference."

In *Felts* v. *Murphy*, 201 U. S. 123, it appeared that a deaf person was tried and convicted of murder. It was claimed that he had been denied due process of law because he had not heard a word of the evidence, and that the evidence should have been repeated to him through an ear trumpet, although it was not clear that he could have been made to understand by that means. After saying that the state court had jurisdiction of the person and of the subject-matter, this court said (p. 129):

"The appellant was not deprived of his liberty without due process of law by the manner in which he was tried, so as to violate the provisions of the Fourteenth Amendment to the Federal Constitution. That amendment, it has been said by this court, 'did not radically change the whole theory of the relations of the state and Federal Governments to each other and of both governments to the people.' *In re Kemmler*, 136 U. S. 436, 448; *Brown* v. *New Jersey*, 175 U. S. 172, 175.

"We are unable to see how jurisdiction was lost in this case by the manner of trial. The accused was *compos mentis*. No claim to the contrary is made. He knew he was being tried, on account of the killing of the deceased. He had counsel and understood the fact that he was on trial on the indictment mentioned, but he did not hear the evidence. He made no objection, asked for nothing, and permitted his counsel to take his own course. We see no loss of jurisdiction in all this and no absence of due process of law. It is to be regretted that the testimony was not read or repeated to him. But that omission did not affect the jurisdiction of the court."

In *Louisville & Nashville R. Co.* v. *Schmidt*, 177 U. S. 230, 236, it was said:

"It is no longer open to contention that the due process clause of the Fourteenth Amendment to the Constitution of the United States does not control mere forms of procedure in state courts or regulate practice therein. All its requirements are complied with, provided in the proceedings which are claimed not to have been due process of law the person condemned has had sufficient notice and adequate opportunity has been afforded him to defend. *Iowa Central Railway* v. *Iowa*, 160 U. S. 389; *Wilson* v. *North Carolina*, 169 U. S. 586."

Due process implies a tribunal both impartial and mentally competent to afford a hearing. But to say that due process is denied when a competent state court refuses to set aside the verdict of a jury because the sanity of one of its members was established by only a preponderance of evidence, would be to enforce an exaction unknown to the precedents of the past, and an interference with the discretion and power of the State not justified by the demands of justice, nor recognized by any definition of due process.

In criminal cases due process of law is not denied by a state law which dispenses with a grand jury indictment and permits prosecution upon information, nor by a law which dispenses with the necessity of a jury of twelve, or unanimity in the verdict. Indeed the requirement of due process does not deprive a State of the power to dispense with jury trial altogether. *Hurtado* v. *California*, 110 U. S. 516; *Maxwell* v. *Dow*, 176 U. S. 581. When the essential elements of a court having jurisdiction in which an opportunity for a hearing is afforded are present, the power of a State over its methods of procedure is substantially unrestricted by the due process clause of the Constitution.

Touching the power of the States over their procedure for the administration of their police power, Mr. Justice Moody, in *Twining* v. *New Jersey*, cited above, said (p. 114):

"The power of their people ought not to be fettered, their sense of responsibility lessened, and their capacity for sober and restrained self-government weakened by forced construction of the Federal Constitution. If the people of New Jersey are not content with the law as declared in repeated decisions of their courts, the remedy is in their own hands."

The proceeding here in question was in absolute conformity to the Massachusetts law of criminal procedure, and no fundamental principle of justice was violated by a determination of the mental capacity of the juror by a preponderance of the evidence. Neither is there any established rule of the common law inconsistent with the practice adopted in this case. There are many decisions in accord with the Massachusetts view of the law, among them being: *State* v. *Scott*, 1 Hawks. N. C. 24; *Burik* v. *Dundee Woolen Co.*, 66 N. J. Law, 420; *State* v. *Howard*, 118 Missouri, 127; *Surles* v. *State*, 89 Georgia, 167.

In *Hogshead* v. *State*, 6 Humphrey (Tenn.), 59, the Supreme Court of Tennessee held that the trial court erred in not granting a new trial when it appeared "probable" that a juror was insane. But in Tennessee the denial of a new trial is assignable as error and reversible upon writ of error.

Our conclusion is that the plaintiff in error has not been denied due process of law, and the judgment is,

Affirmed.

MR. JUSTICE PITNEY took no part in the hearing or consideration of this case.